IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, and JEAN LANE, individually and as Chief of Police of the County of Maui,

Appellants,

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,

Appellees.

No. 12300

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii,

Appellant,

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,

Appellees.

No. 12301

Upon Appeal from the United States District Court for the District of Hawaii, Sitting *En Banc*

APPELLEES' ANSWERING BRIEF

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APPELLEES' ANSWERING BRIEF

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APPELLEES' ANSWERING BRIEF[1]

JURISDICTIONAL STATEMENT

These are appeals from a unanimous final decision[2] in these two cases of the United States District Court for the District of Hawaii, sitting *en banc,* composed of Senior United States Circuit Judge John Biggs, Jr., of the Third

[1] The amicus brief of the Bar Association of Hawaii supports the position of appellants on jurisdiction. Since the amicus brief raises no issues not raised by appellants, this answering brief is directed both to appellants' opening brief and the brief of the Bar Association.

[2] Opinion reported 82 F. Supp. 65, R. 366-520.

Judicial Circuit, Senior United States District Judge Delbert E. Metzger, of the United States District Court for the District of Hawaii, and United States District Judge George B. Harris, of the Northern District of California.

The court found that appellees' complaint for injunction and for redress of deprivation of civil rights stated a case of both federal and equitable jurisdiction, and after full hearing on the merits, made findings of fact and entered its decrees (a) adjudging the unlawful assembly and riot act and the conspiracy act of the Territory of Hawaii void as unconstitutional; (b) restraining the appellants, Ackerman, Bevins, Crockett and Lane, and their respective agents, deputies and successors in office, from proceeding with the prosecution of the individual appellees under any complaint or indictment based on these acts; (c) declaring the method of selection of the Grand Jury of Maui County in violation of constitutional requirements; and (d) granting the benefits of the decree to the union appellee and appellees Kawano and Rania in their representative capacities.

The cases are appealed to this Court under Section 1291 of the new Judicial Code and in accordance with the decision of the United States Supreme Court in *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368.

STATEMENT OF THE CASE[3]

A. Parties, Issues, and Jurisdiction

These two cases are civil rights cases brought to redress the deprivation under color of territorial law of constitutional and federal rights. The appellees, plaintiffs below, are an unincorporated association and labor union, two officers and members of the union in their representative capacity on behalf of the 30,000 members of the union, and 127 individuals threatened with specific prosecutions under

[3] Unless otherwise indicated, the facts in the Statement of the Case appear in the Opinion, 82 F. Supp. 65, R. 366-520, R. 2-26, 31-34, R. 12,300, 2-34.

color of one or both of the two territorial laws found by the court below to be void as unconstitutional.[4]

The individual appellees and the members of the union are daily wage earners in the sugar and pineapple and other industries of Hawaii. The individual appellees are ethnologically (or as a matter of mores of the Islands) members of races other than the Caucasian race.

The jurisdiction of the District Court was found to rest on Sections 1343 and 1337 of Title 28 of the Revised Judicial Code and the Civil Rights Act.

The appellants at both numbers are the Attorney General of the Territory, the Chief of Police of Maui County, and the former County Attorney of Maui County, and his Deputy, at the time the acts complained of occurred. The action as to other defendants named in the complaint was dismissed by the District Court.

The appellees' complaints alleged that strikes were conducted by the union in the sugar and pineapple industries in 1946 and 1947; that in furtherance of the objectives of the strike, that is, the improvement of wages, hours and conditions of employment, the appellees engaged in lawful, peaceful and constitutionally protected activities of speech, press and assemblage, and of peaceful picketing.

The complaint, at Number 12,300, alleged that the appellant Chief of Police caused the individual appellees to be arrested and charged by police complaint with purported violations of the territorial unlawful assembly and riot act; that the appellants Ackerman, Bevins and Crockett sought to present purported criminal charges, framed on the police complaints, to the grand jurors of Maui County; that the

[4] The 52 individual appellees, other than Kawano, at No. 12,300, are threatened with prosecutions. Since the unlawful assembly act complained of is a felony, prosecution can be only by indictment of the grand jury. An indictment under both the unlawful assembly act and the conspiracy act has been returned, under circumstances hereafter described, against the individual appellees, other than Rania, in 12,301.

unlawful assembly and riot act, under which the appellants sought to present purported criminal charges, is unconstitutional in that it deprives the appellees of their rights of free speech, press and assembly for reasons set out in the complaint, and will subject them to criminal prosecution if they exercise their constitutional rights; that certain of the individual appellees had filed motions and challenges to the grand jury and to the methods employed in selecting its members; that the grand jury had been selected and composed in a manner violating the constitutional rights of these appellees, for reasons set out in the complaint, and that challenges and motions had been held to be without merit in a hearing in which these appellees were denied due process of law.

The complaint at Number 12,301 differed in that it also attacked the conspiracy statute of the Territory; it alleged that the appellants had presented purported criminal charges of alleged violation of the unlawful assembly and riot act and the conspiracy act to the grand jurors against the individual appellees; that the grand jury, to which such purported charges were presented, was selected and composed in a manner which violated the appellees' rights.

The complaints at both numbers alleged that unless the unlawful assembly and riot statute and the conspiracy statute were held to be unconstitutional and void, the appellees would be deprived of their constitutional rights, and that it was necessary and imperative for the court to assume jurisdiction and restrain and enjoin the appellants in order that appellees have an impartial, representative and democratic grand jury; that appellees had no plain, adequate or speedy remedy at law, and that unless appellants were enjoined as prayed, appellees would be deprived of rights secured to them by the Constitution and laws of the United States; that the union cannot function, exercise its property and personal rights in the County of Maui so long as its members are subject to indictment by illegally constituted

grand juries, and subject to prosecution under these unconstitutional statutes, because of the fear and intimidation of its members engendered by the threat of punishment for the exercise of rights guaranteed by the Constitution.

Appellees prayed that the court issue temporary and permanent injunctions prohibiting the enforcement of these statutes against the appellees and enjoining the submission to the grand jury of purported charges based on the unlawful assembly and riot act; that the court declare the statutes to be unconstitutional and adjudge the methods used in selecting the grand juries of Maui County to be unconstitutional and contrary to law.

B. Proceedings in the District Court

On the basis of the showing made of the unconstitutionality of the statutes, and irreparable injury to appellees, a temporary restraining order was issued by Federal District Judge Metzger and confirmed, though modified in form, after the hearing on the return to the order to show cause and motion to dissolve it. (R. 27, 99-103.)

Pursuant to the prayer of the complaint, and in accordance with the state of the law as it existed under the decision in *Mo Hock Ke Lok Po v. Stainback,* 74 F. Supp. 852, a three-judge court was convened to hear the case.

The technical and legal objections here raised by appellants to the complaint and its sufficiency, the jurisdiction of the court, and the propriety of the parties, were considered by the District Court at every stage of the proceeding and overruled, except in regard to the dismissal as to certain of the defendants.

The reasons stated by the District Court for overruling the motion to make more definite was that:

> the protracted arguments demonstrated that the defendants and their able counsel are fully informed of the nature of the complaints and that no further par-

ticularization or specification of the plaintiffs is necessary. (R. 335)

The District Court overruled the motions to dismiss and for summary judgment, finding a likelihood that the introduction of evidence would make the grave constitutional issues clearer. *Borden's Farm Products Co. v. Baldwin,* 293 U.S. 194, 213. See also *Gibbs v. Buck,* 307 U.S. 66, 76. (R. 335-336, R. 379, note 6.)

The parties and the court agreed to combine the hearings on the temporary and permanent injunction.

C. Evidence and Findings of Fact and Conclusions of Law of the District Court

1. Evidence and Findings of Fact Relevant to Both Cases

Upon the hearing on the merits, the appellees showed a persistent and long continued policy of the appellant law enforcement officers of singling out members of the union, including the individual appellees, for harsher treatment than other persons in the community for like offenses, and a persistent policy of treating picketing as conspiratorial in nature, invoking the unconstitutional twenty-year felony of unlawful assembly and riot and the conspiracy act against the members of the union for trivial incidents and minor law infractions occurring during the course of picketing activities.

The extraordinary and exceptional nature of the economic and sociological background of Hawaii's industrialized agriculture, in which the labor disputes involving appellees arose, is described and found by the court from standard and accepted sources. (R. 380-390)

The use and application of these two statutes in labor disputes and a picture of the way laborers engaged in labor disputes have in the past fared in territorial courts is shown in a Memorandum on Labor and the Law, filed by appellees at the request of the court. (Appendix I, at page 1.)

The District Court found as fact:

That the union has spent in excess of one-third of a million dollars in Hawaii since 1944 in organizing 30,000 workers in the sugar, pineapple and other industries; that large sums of money are spent monthly in the administration and servicing of the locals; that the money is contributed by the members through monthly dues.

That the purpose of the union is to improve the wages, hours and working conditions of its members in these industries; that the union and its members have no way of achieving their objectives except by striking, if collective bargaining and voluntary mediation fails to settle disputes because the employers of the members of the appellee union all refuse to submit contract issues involving wages to arbitration.

That wages for common labor had been increased from $1.84 a day, fixed by the federal government in 1943, to which a 15% bonus was added, to in excess of eight dollars a day under existing union contracts.

That the fear generated by the mass arrests made by appellants under color of the unlawful assembly and riot statutes against the individual appellees in these cases for minor disturbances on picket lines has seriously weakened the ability of the union to strike.

That mass arrests during the pineapple strike, under color of these statutes, for picket line disturbances broke the strike and demoralized many of the workers, who left the union; that after the strike, membership on the island of Lanai, where the mass arrests occurred, dropped from 1300 to 800.

That the unlawful assembly and riot acts substantially affected the course of labor-management relations in Hawaii as the union felt it would be suicide to strike for higher wages in the face of the consistent established use of the 20-year felony of unlawful assembly and riot for minor disturbances on picket lines.

That during the sugar strike, 21 members of the union were charged with and indicted for unlawful assembly and conspiracy; that the charges were dropped two months after the Territory-wide strike was over and nolo contendere pleas accepted to misdemeanor assault and battery charges.

That during the pineapple strike, 83 members of the union were arrested; that the charges were dropped, after the strike, for lack of evidence. Appellees introduced evidence to show that these arrests were made and the defendants in the case held for five hours purportedly for violations of the unlawful assembly and riot act, and that finally a charge of obstructing the highway was made and dropped after the strike for lack of evidence.

That the mere existence of the statute has been used by Territorial courts to justify sweeping injunctions against peaceful picketing except as limited to three.

That excessive bail[5] was exacted in these cases; that mass arrests were made in many instances where no evidence of even presence at the scene of the alleged incident existed, other than pictures concededly taken at the scene both before and after the incidents occurred; that the reported cases indicated that the unlawful assembly and riot statutes had been used only against labor while engaged in labor disputes, since Hawaii became a part of the United States.

The present suits grew out of three incidents which occurred during the 1946 sugar strike and 1947 pineapple strike.

The 1946 sugar strike commenced on September 1, 1946 and lasted until November 19, 1946, except at Pioneer Mill Company, Lahaina, Maui, where it continued until January 2, 1947 because that company discharged for purported violations of its house rules ten of its employees upon their being charged with unlawful assembly, riot and conspiracy. (R. 1191, 1196-1197.)

[5] Bail in assault and battery and other misdemeanors ordinarily does not exceed $25.00 in Hawaii.

The 1947 pineapple strike lasted from July 10 to July 15, 1947.

2. The Paia Incident—12,301

The court's finding of facts on this incident are set forth at pages 391-401 of the Record. The appellants do not complain of these findings. Indeed, they cannot, since the District Court accepted appellants' version of the facts as to the incident, even though appellees' witnesses and the pictures introduced in evidence give a substantially different version.

The District Court's findings on the Paia incident show: Beginning September 1, 1946, 20,000 sugar workers in the Territory went on a strike which was authorized by a vote of 94 percent of the union's members. The 79-day strike was remarkable in its freedom from incidents involving infractions of the law (R. 399, note 25). At Paia, Maui, where the Maui Agricultural Company is located, 1,000 employees were on strike. Paia is a company town of 3,000 inhabited almost wholly by the employees of the company, including members of the union and their families.

For the first 45 days of the 79-day strike, large groups of pickets peacefully picketed the premises of the company. Police were present at most times and raised no objections. On the 46th day of the strike, October 16, 1946, there was a moving picket line estimated varyingly from 250 to 500 persons. Five employees desiring to return to work and 18 to 20 police officers were present. When these employees approached the line and it did not open up, Assistant Chief of Police Freitas called the pickets together into a group and read them the loitering statute which provides:

> Any person who shall loiter or loaf or idle upon any public highway, street or sidewalk, thereby impeding or rendering dangerous the passage of pedestrians or others lawfully using the public highway, street or sidewalk, or thereby in any way imperiling the public wel-

> fare or thereby tending in any way to cause a breach of the peace, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $25 nor more than $250 or imprisonment for not less than thirty days nor more than 90 days.

The picket line was not opened and after this second attempt, the five men left. No order to disperse was made at any time by any of the police officers present.

The whole incident took no more than three minutes. Assistant Chief of Police Freitas testified that he congratulated the people on keeping their heads and that they applauded him. He testified that he thanked one of the plaintiffs, Joseph Kaholokula, for his assistance in getting the pickets to listen to him, and told him that he was glad nothing serious had occurred. He said he might make a test case of the loitering statute against four or five of the pickets.

No arrests were made at that time, and none were made until at least three days later when the same police officer swore out a complaint charging approximately fifty of the appellees with unlawful assembly and riot.

Appellees were arrested, questioned without being warned of their rights and required to put up bail ranging from $1,000 to $100. Subsequently seventy-nine persons, including four shown not to have been on the picket line that morning, were indicted for unlawful assembly and riot.

They were arraigned before the Second Circuit Court and demurred to the indictment. When the demurrer was overruled, an interlocutory appeal was taken to the Supreme Court of the Territory which held the indictment defective but upheld the constitutionality of the statute on November 26, 1947.

While the case was still pending before the Supreme Court, and before the 20-day period allowed for rehearing expired, and before the remittitur went from the Supreme Court to the Second Circuit Court, and at a time when the appellants were restrained by order of the District Court

from proceeding to indict the individual appellees in 12,300 because of the alleged unconstitutionality of the unlawful assembly statute as well as the unconstitutionality of the method of selection and composition of the 1947 grand jury, the appellants, without notice to appellees, presented and procured an indictment under the challenged statute from the challenged jury.

3. The Lanai Incidents—12,300

The District Court's findings of fact on the Lanai incidents are set forth at pages 402-409. The court, in these incidents, also adopted as facts testimony of appellants' witnesses.

In sum, the evidence shows that during the 1947 pineapple strike, which lasted from July 10 to July 15, 1947, the employees of the Hawaiian Pineapple Company on the Island of Lanai, which is owned by the company, were on strike.

The population of Lanai is approximately 3,000 and is made up primarily of the employees of the company, including the 1,300 agricultural workers, members of the appellee union, and their families.

Most of the employees live in the company town of Lanai City, which is inland about seven miles from the harbor where the harbor incident involving 47 of the individual appellees occurred.

Present at the time were six police officers, a number of union men, spectators and eight company supervisors or executives. On the dock were 11 bins of six-day old pineapple picked before the strike. A barge dispatched from Honolulu arrived about 4:00 o'clock to pick up the pineapple.

The court notes that the evidence shows that a barge customarily carries 152 bins of pineapple, and that pineapple is customarily shipped within 48 hours after picking.

When the barge docked and the company supervisors

started to load the pineapple, some of the union pickets crossed the kapu (no trespass) line and threw pineapples out of the bins and punched one of the supervisors and chased another of the company men operating the crane.

The evidence offered by appellants and accepted by the court in its findings shows at its very worst that two persons were assaulted and battered and some pineapples were thrown out of bins.

Three photographers, including one of the police officers, were stationed at various angles taking pictures. Pictures concededly taken at the harbor the morning of the incident and after the incident was over were used for identification in the mass arrests that followed.

Eleven of the appellees in 12,300 were arrested on the 15th and held incommunicado, and finally released on excessive bail on a charge of unlawful assembly and riot. About two weeks later, 51 additional persons, including 36 of the individual appellees in 12,300 were arrested and charged with unlawful assembly and riot. 4 were dropped before the preliminary hearing, and 12 thereafter. One also was dropped on the mistaken impression that he didn't belong to the union.

The Kalua incident involved assault and battery on two non-union employees who worked throughout the strike. Five of the individual appellees were arrested, charged with unlawful assembly and riot as a result of this incident, and released on excessive bail of $1000 each.

4. The Grand Jury Issue

The District Court found that the evidence before the court showed that the 1947 Maui County Grand Jury was not impaneled in accordance with law. It found that although at the hearing of the challenges by certain of the individual appellees at Number 12,300 but a limited review of the methods employed to select the grand jury was permitted, there was sufficient evidence in the record to demon-

strate the erroneous method employed in selecting the grand jury.

The District Court found that 84% of the persons selected and listed for grand jury service in 1947 came from the ranks of the employer-entrepreneur group and their salaried (non-labor) employees, and that all other groups in the community, including labor, had approximately a 16% representation, although male laborers in Maui County comprised 79% of the total male population of the County.

The District Court found that the haole group in Maui County comprised but about 3.6% of the population, but the grand jury contained 21 haoles or 42% of the list.

It found that the percentage of Koreans, Hawaiians, Puerto Ricans and Filipinos on the list was zero, and that Filipinos constituted the second largest national group in the County as well as in the Territory, there being over 10,000 Filipinos in the County. The court also found that appellees had shown that there were qualified Filipinos.

The District Court found on the basis of the testimony of Jury Commissioner Pombo, as well as the composition of the grand jury, that appellees had proved a deliberate exclusion of Filipinos from grand jury service as well as a deliberate weighting of the grand jury list in favor of haoles and business men and against the laboring men of the community.

It found that the selection of jurors was made primarily from persons personally known to the jury commissioners.

The District Court also found that the commissioners used a questionnaire requiring prospective jurors to state where they were born and the "nationality" of both parents; that the questionnaire was not shown to have been employed for any purpose within the law and was in derogation of Section 83 of the Hawaiian Organic Act requiring the selection of jurors without reference to the race or place of nativity of the jurors.

The District Court concluded that the method of selection of the 1947 Maui County Grand Jury, within principles well established and clearly defined by the United States Supreme Court, was in violation of the Fifth and Sixth Amendments and was not a fair cross-section of the community of Maui County.

5. Bad Faith of Prosecutions

On the basis of the record before it, the District Court found that the criminal prosecutions against the individual appellees were carried on by appellants for the purpose of attack upon a labor movement rather than for the ends of justice. In reaching this conclusion, it relied on all facts found in the case, and cited specifically:

> 1. (a) The mass arrests shown by the record in the Paia incident, the harbor incident, and on Oahu;
>
> (b) The naming of persons as defendants in criminal proceedings from photographs taken both prior and subsequent to incidents alleged as violations of the unlawful assembly and riot act;
>
> (c) The fact that no arrests were made during the course of the incidents charged as violations of the unlawful assembly and riot act;
>
> (d) The excessive bail required of many of the individual appellees in the instant cases;
>
> 2. The fact that Assistant Chief Freitas read the loitering law and not the unlawful assembly and riot act to the strikers and did not contemplate the swearing out of a complaint against the individual appellees under this act until instructed to do so by the prosecuting officers.
>
> 3. The repeated selection of the unlawful assembly and riot act with its heavy penalties as vehicles for the prosecution of comparatively minor infractions of the criminal laws;
>
> 4. The haste with which prosecuting officers procured the second indictment against the individual appellees in case Number 12,301 after the first indictment was held invalid by the Supreme Court of Hawaii;

5. The fact that these laws were not invoked except in connection with labor disputes during the life of the Territory;

6. The fact that the maximum penalty under the unlawful assembly and riot act was increased from five years imprisonment to twenty years imprisonment after a strike of Filipino workers in 1924.

6. Irreparable Injury, Exceptional Circumstances, and Unconstitutionality of Statute

On the basis of its findings of fact, the District Court found that exceptional circumstances existed and that an equitable cause of action had been made out.

The District Court found the unlawful assembly and riot act and conspiracy act of the Territory unconstitutional on their face; that the impact of the two statutes as employed and as about to be employed by the appellants is such as to disrupt immediately any substantial possibility or opportunity for genuine collective bargaining between the employers of the sugar and pineapple industries and their employees; that the very existence of these two statutes as well as the manner of their enforcement by appellants so heavily weighted the scale in favor of the employer and against the employee as to render fair collective bargaining a virtual impossibility; that on the basis of the evidence presented, equitable and amicable relations between employers and employees in Hawaii are impossible while the statutes stand; that the repercussions that arise from the enforcement of these statutes in Hawaii are such as to cause irreparable damage to all labor relations in Hawaii.

The District Court found other and equally cogent reasons why injunctions prayed for must issue, based upon the court's findings that the criminal prosecutions were not brought by appellants in good faith; and that the violation of federal rights implicit in the selection of the grand jury was such as to violate constitutional standards made explicit by rulings of the United States Supreme Court.

D. Decrees and Judgments

On the basis of its findings of fact and conclusions of law, set forth in its opinion, the District Court for the District of Hawaii, sitting *en banc,* made and entered its decree granting judgment to appellees and declaring the unlawful assembly and riot act and the conspiracy act of Hawaii void as unconstitutional, enjoining the prosecution of appellees under any complaint or indictment based on these laws, and holding void the indictment in 12,301 because of the illegal constitution of the grand jury.

ISSUE IN THIS COURT

The question before this Court is whether, taking the record as a whole, substantial justice has been done. Appellees submit that it has, that appellants' attacks on jurisdiction are not well founded, and that other legal and technical objections, singly or in sum, do not present facts showing any substantial prejudice to appellants. The decrees and judgment should therefore be affirmed.

SUMMARY OF ARGUMENT

A. Theory of the Case

Appellees' theory of their case, as set forth in their complaint and as presented and argued before the District Court at every stage of the proceeding, and in the presentation of evidence of deprivation of federal rights, bad faith in the prosecutions and denial of equal protection of the laws, was based squarely on rules laid down in the decisions of the United States Supreme Court in *Hague v. CIO,* 307 U.S. 496, *Douglas v. Jeannette,* 319 U.S. 157, and *American Federation of Labor v. Watson,* 327 U.S. 582.

In *Hague v. CIO,* the Supreme Court held that federal courts have jurisdiction of suits brought under the Civil Rights Act, without regard to jurisdictional amount, to redress the deprivation of federal rights. The court declared void on their face and restrained the enforcement of two ordinances of Jersey City, one of which required permits to

be obtained for the holding of parades and public assemblies, and authorized the Director of Public Safety to refuse a permit only for the purpose of preventing riots, disturbances and disorderly assemblages.

In *Douglas v. Jeannette,* the Supreme Court again held that federal district courts have jurisdiction of suits for injunction brought under the Civil Rights Act, without regard to jurisdictional amount, to redress the deprivation of federal rights under an unconstitutional ordinance and to restrain its enforcement. Notwithstanding the authority of the District Court to hear and decide the case, the Court said that as a matter of discretion federal courts should refuse to interfere with criminal proceedings in state courts "save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent."

Appellees met every standard laid down by the court for an exceptional case.

First, the Supreme Court said that courts of equity do not ordinarily restrain criminal prosecutions since no person is immune from criminal prosecutions in good faith for alleged criminal acts, and the constitutionality can be as readily determined in the criminal case as in the suit for injunction.

This appellees met by showing that appellants were not acting in good faith in arresting and prosecuting appellees under color of the unconstitutional laws complained of, and that the grand jury to which appellants presented or threatened to present these purported charges was illegally constituted.

They showed that the question of constitutionality could not be as readily determined in the criminal proceedings since the Territorial Supreme Court had upheld the statute as valid on its face and had in effect broadened its scope in a proceeding from which no appeal could be prosecuted.

Second, the Supreme Court said that the state courts are

the final arbiters of the meaning and application of the statute. Here the Territorial Supreme Court had already interpreted the statute and held it valid, so that a decision as to whether the statute, as so interpreted, was valid was ripe for federal decision.

Third, the Supreme Court said that the arrest by federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court, are to be supported only on a showing of danger of irreparable injury both great and immediate.

What constitutes a showing of irreparable injury the court made specific in *American Federation of Labor v. Watson*. There, the court held that the impact upon a labor union and the threat of disruption of a system of collective bargaining protected by federal law was such as to meet this strict test. The District Court found appellees' evidence met this test.

In *Screws v. United States,* 325 U.S. 91, in upholding the criminal conspiracy section of the Civil Rights Act—which is in *pari materia* with the section affording civil relief—the Supreme Court said that "to deprive a person of a right which has been made specific either by express terms of the Constitution or laws of the United States or by decisions" of the Supreme Court interpreting them supplied the specific intent necessary to constitute wilful deprivation of rights. A local officer, the Court said, who persists in enforcing a type of ordinance which the Supreme Court has held invalid as violative of the guarantees of free speech or freedom of worship, or a local official who continues to select juries in a manner which flies in the teeth of decisions of the Supreme Court knows exactly what he is doing.

> He violates the statute not merely because he has a bad purpose, but because he acts in defiance of announced rules of law. He who defies a decision interpreting the constitution knows precisely what he is doing.

Appellees showed that the unlawful assembly and riot act of the Territory parallels in every respect, except the death penalty, the Riot Act of George the First, which the Supreme Court in *Bridges v. California,* 314 U.S. 252, specifically cited as a measure which the Bill of Rights prohibited the American Congress from passing.

The conspiracy act on its face falls clearly within that type of vague and indefinite statute which the Supreme Court struck down in *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, on the ground that

> to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

Appellees met with exactitude the quantum of proof held sufficient to show a deliberate and substantial exclusion from the grand jury list of persons on account of race, in a long line of cases from *Strauder v. West Virginia,* 100 U.S. 303, through *Patton v. Mississippi,* 332 U.S. 463, and as to exclusion of wage earners, the test laid down in *Thiel v. Southern Pacific Co.,* 328 U.S. 217. Appellees showed that the 1947 grand jury was illegally composed within the principles laid down in *Fay v. New York,* 332 U.S. 261.

These specific decisions and matters had been presented to the territorial courts, which had refused to give them effect.

There are four major premises under the theory of the case that will be developed: the federal and equitable jurisdiction of the District Court, the unconstitutionality of the unlawful assembly act, of the conspiracy act, and of the method of selection of the grand jury. Appellants attack each of these premises in sum and in fragment.

I.

FEDERAL AND EQUITABLE JURISDICTION

Under this section Points I, II, V, VI, VII, VIII, IX, X, and XII of appellants' Brief—all of which attack the power of the court to hear and determine the cause, or the propriety of the exercise of its equitable discretion for legal or factual reasons—are discussed.

Appellees show that the authorities cited by appellants are not apposite and do not sustain their attack on the jurisdiction of the District Court or the propriety of the exercise of its equitable discretion.

The power of federal district courts to hear civil rights suits for injunctive relief, and where exceptional circumstances exist and irreparable injury will result, to restrain state or territorial officers acting under color of unconstitutional statutes cannot be questioned as appears from the authorities cited in the foregoing statement of the theory of appellees' case, and the authorities discussed in this section of appellees' brief.

II.

THE UNCONSTITUTIONALITY OF THE UNLAWFUL ASSEMBLY AND RIOT ACT

Under this section the contentions made in Point III of appellants' Brief are considered. The clear-cut condemnation of statutes of this type by the United States Supreme Court in a long line of decisions in First Amendment cases from *Near v. Minnesota,* 283 U.S. 697, to *Bridges v. California,* 314 U.S. 252, is shown. The doctrine of *res adjudicata* has no application to the circumstances of this case. Even if it were otherwise, the union, the class representatives and four of the individual appellees would not be affected.

The Supreme Court of Hawaii specifically upheld the statute on its face without limiting or narrowing it in any way. Indeed, the sweep of the statute was broadened by the

construction that an order to disperse was not required before the heavy penalties of the statute could be incurred.

If appellants' contention that the Federal District Court was bound to reach the same conclusion as to constitutionality that the Supreme Court of Hawaii reached were correct, the results would be a revolution in law. Every three-judge court convened to hear a challenge to the constitutionality of a state statute would be bound by the state court's decision. It is scarcely a worthy argument. See *Lane v. Wilson,* 307 U.S. 268.

The Supreme Court of Hawaii, having judged and upheld the statute on its face, the doctrine of deference is not apposite. Even so, the District Court did note that the Supreme Court of Hawaii held an order to disperse not necessary and considered the statute in that light. The statement of the Supreme Court that the statute has no relation to peaceful picketing says no more than that the statute is constitutional in the opinion of the court. This is clear from the fact that the test of accountability, as appellants call it, was framed by the Supreme Court of Hawaii wholly in the words of the statute and by reference to sections of the statute.

The repeal of the statute, except as to appellees, and the reduction of the penalty under the new law even as to appellees, does not affect the question of constitutionality. It throws considerable light on the case as an admission against interest of appellants as to the grossly excessive nature of the penalty of twenty years. The repealing bill was sponsored by appellants. It is tantamount to an admission that the District Court and appellees were justified in their condemnation of the penalty provisions of the law. As originally presented to the Legislature by the appellant attorney-general the bill sought to preserve the right to proceed against appellees for the twenty-year maximum, although the penalty under the succeeding act was reduced by eighteen years. See Minority Report on House Bill 442, appendix II. It

does not appear whether the appellant attorney-general was responsible for the largesse, or the Legislature.

III.

THE UNCONSTITUTIONALITY OF THE CONSPIRACY ACT

Under this section the contentions made by appellants in Point IV of their Brief are considered.

Appellants tacitly concede the unconstitutionality of a portion of this act and that the indictment against the appellees in 12,301 is in part based on the unconstitutional portion. They urge, however, that the District Court should have let the criminal case proceed since a portion of the statute might be held to be valid.

This statute has been authoritatively construed by the Supreme Court of Hawaii in *Territory v. Soga,* 20 Haw. 71. The appellants, however, do not seek to determine its construction or to invoke the rule of deference on this statute. They remain silent as to the existence of the case.

As authoritatively construed the conspiracy statute permitted the conviction of four strike leaders of the 1909 strike of Japanese workers, two of whom were newspaper editors. Under the complaint the defendants were charged with conspiring to impoverish a sugar company by inciting laborers to ask for higher wages. The means used were newspaper articles, a play and speeches. The court said that it was a fair inference that these articles were susceptible of being interpreted as urging and approving violence by the fact that some violence subsequently occurred. The defendants were sentenced to ten months imprisonment and fines and costs. Most of the evidence was obtained by dynamiting the safe of one of the defendants. Prosecutors were the attorneys for the sugar company. See Memorandum on Labor and the Law, appendix I, p. 14.

The statute is clearly void.

IV.

THE GRAND JURY ISSUE

Under this section appellants' contention with respect to the grand jury issue in Point XI of their Brief is considered.

The District Court held that appellees had no opportunity to challenge the grand jury under the circumstances in which appellants procured their indictment, and that it was doubtful if territorial law afforded appellees a remedy. The District Court held it had jurisdiction to hear and decide the question presented, which was whether the appellees were being deprived of federal rights. The District Court further held that even if this were not so, since it had acquired jurisdiction, on adequate grounds, that its decision should not be truncated. Appellants' arguments to the contrary are not persuasive.

Under the Civil Rights Act, one may sue to redress deprivation of a federal right even without exhausting remedies under state law. *Lane v. Wilson,* 307 U.S. 268, *Bomar v. Keyes,* 162 F 2d 136. The denial of a fair and representative grand jury is *per se* a denial of equal protection of the laws. It is to be noted that the relief sought is declaratory and not injunctive, and that a real controversy exists, the appellees having been indicted. It is also true that the denial of this right leaves the state court without jurisdiction to try a defendant under an indictment returned by such a grand jury. *Patton v. Mississippi,* 332 U.S. 463.

A showing that there has been no Filipino on the grand jury of Maui County in thirty years; that Filipinos constitute twenty per cent of the population of the County; that there are qualified Filipinos; that jury questionnaires of Filipinos showing the same qualification as persons selected for jury service were marked "not qualified" and questionable; and the testimony of a jury commissioner that no Filipinos were selected because they had men that were better;

when a large number of the individual appellees are Filipinos, is a sufficiently clear showing to bring appellees explicitly within the scope of Supreme Court decisions declaring such exclusion and discrimination a violation of constitutional rights.

A showing that 84 per cent of a jury list is composed of representatives of the employer-entrepreneur group which comprises 15 per cent of the community and that the same percentages existed for at least the past five years, coupled with a showing by testimony of a jury commissioner that business men and their employees were better jurors than truck drivers, that male workers constituted 79 per cent of the population and that there were no agricultural workers on the list although 49 per cent of the population were agricultural laborers and all of the individual appellees belong to the excluded class is a sufficiently clear showing to warrant a conclusion that there was a deliberate and substantial weighting of the jury in favor of business men and against laborers and to condemn the method of selection as a denial of a grand jury properly constituted within the rule of the *Thiel* case.

A showing that the grand jury list contained 42 per cent haoles—defined as Caucasians exclusive of Portuguese—and with a gloss of rank or economic status—when haoles constituted only 3.5 per cent of the community, coupled with the testimony of a jury commissioner that he selected haoles because they wanted to run the country and they owned the country and that all the individual appellees were non-haole was a sufficiently clear showing to warrant a finding of deliberate and substantial weighting of the jury based on race and economic status and to condemn a jury so selected as discriminatory.

ANSWERING ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION AND THE EXERCISE OF ITS DISCRETION WAS PROPER.

A. The District Court was Properly Constituted as the District Court for the District of Hawaii, Sitting En Banc (B. 43-45).

The District Court held that if the requirements for a three-judge court under Section 2281 of Title 28 of the new Judicial Code do not apply to Hawaii—as the United States Supreme Court has since ruled in *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368—that the three judges, being either in the active service of the District Court for the District of Hawaii, or duly designated and assigned to sit as district judges of that court, were authorized to hear and determine the case as the Federal District Court for the District of Hawaii, sitting *en banc.* (R. 432-435, 521-522, 543-500; 12,300, R. 89-96.)

Appellants dispute this. (B., 43-45) Since it is clear that this Court has the right to review the decision under the *Mo Hock* case, and since all three judges are clearly authorized to sit under the provisions of Section 132 of Title 28 of the new Judicial Code, which specifically applies to Hawaii, there is no question of the *power* of the three judges to sit as the District Court for the District of Hawaii.

Apparently, appellants wish to cut down the stature of the decision and to insist that this Court, ostrich-like, look upon the unanimous decision of three federal judges as if it were the decision of one judge.

B. The Jurisdiction of the District Court Rests on Section 1343 of Title 28 of the New Judicial Code and the Civil Rights Act and on Section 1337 of the New Judicial Code. Alternatively, Jurisdiction Exists Under Section 1331 of the New Judicial Code.

1. Existence of Jurisdiction Under Section 1343 and the Civil Rights Act (B. 45-48, 49-50, 75-82).

The District Court held that it had jurisdiction of the parties and of the deprivation of constitutional rights com-

plained of under Section 1343 of the new Judicial Code[6] and the Civil Rights Acts, R. S. Section 1979, 8 U.S.C.A. 43, R. S. Section 1977, 8 U.S.C.A. Section 41, without regard to jurisdictional amount. (R. 436-438)

Appellees candidly urged before the District Court and urge here that the District Court has jurisdiction under 1343 and the predecessor of this section, Section 24 (14) of the old Judicial Code, 28 U.S.C.A. 41 (14), without regard to jurisdictional amount, in spite of the conflict in decisions.[7] Appellants concur that this section confers jurisdiction of deprivation of constitutional and federal rights on individuals in Hawaii in a proper case, without regard to jurisdictional amount, despite the absence of the word "territory." (B. 46-47)

This question is of great importance to Hawaii and a resolution of the conflict in decisions is certainly desirable.

Since the right to sue is clearly given under Section 43 of Title 8, and the problem is the imperfect creation of a forum, *Bell v. Hood,* 327 U.S. 678, would seem to be conclu-

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[6] Both Section 24 (14) of the old Judicial Code, cited in appellees' complaint and Section 1343 of the new Judicial Code, effective at the time of decision are set forth in full at page 165 of the Appellants' Brief.

[7] The first decision on the right of persons to maintain an action based on the Civil Rights Act without proof of jurisdictional amount was *Alesna v. Rice,* Civil No. 769 in the records of the United States District Court for the District of Hawaii, in the Ruling Upon Motion for a Preliminary Injunction, filed February 25, 1947. This ruling held 41 (14) applicable to Hawaii.

The next decision on the point, *Mo Hock Ke Lok Po v. Stainback,* 74 F. Supp. 852, reversed on other grounds, 336 U.S. 369, denied the application of 41 (14) to Hawaii.

In *Alesna v. Rice,* 74 F. Supp. 865, affirmed on other grounds, 172 F. 2d 176, the question was re-examined by the District Court in the light of the *Mo Hock* decision and its earlier decision upholding jurisdiction reaffirmed. Here the District Court held that Section 1343 of the new code applies to Hawaii basing its decision in part on the full status given to the United States District Court for the District of Hawaii under the new code, and without expressing an opinion as to the old code section. See full discussion of problem, *Alesna v. Rice,* 74 F. Supp. 865, 868.

sive that the word "state" should here be construed to include "territory":

> And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the State to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Conceding the right of the individual appellees to sue under Section 1343 of the new Judicial Code, appellants assert that the District Court erred in holding that the union appellee may maintain the suit without showing of jurisdictional amount. The District Court's reasoning and authorities seem unassailable on this issue. (R. 436-439, 513-515, B. 45-46)

Appellants point to the fact that only the individual plaintiffs were permitted to sue in *Hague v. CIO,* 307 U.S. 496. They misconstrue the case and misstate the District Court's position. That ruling was based on the opinion of the majority of the justices in the *Hague* case that the right to assemble and discuss the benefits of national labor legislation is a privilege and immunity of citizenship. Only natural persons are protected by the privileges and immunities clause. Justice Stone placed jurisdiction on the due process clause in his dissenting opinion, concurred in by Mr. Justice Reed and, as to this point, Mr. Chief Justice Hughes. In *Douglas v. Jeannette* Mr. Justice Stone wrote the opinion of the court, basing it on due process.

Appellees believe that the situation in a territory is different than in a state. Neither the privileges and immuni-

ties clause nor the due process clause is necessary to transmit the guarantees of the First Amendment. As Congress is prohibited directly from passing laws abridging free speech by this amendment, so is a territory which exercises only power delegated by Congress. Deprivation of rights under both the First and Fifth amendments is asserted by appellees.

As the District Court points out, corporations are "persons" within the meaning of the due process clause of the Fourteenth Amendment and are entitled to protection against the abridgment of a free press by state action. *Near v. Minnesota,* 283 U.S. 697, *Grosjean v. American Press,* 297 U.S. 233. See also Rule 17b of the Rules of Civil Procedure on capacity to sue, Rule 23 on class actions, *Stapleton v. Mitchell,* 60 F. Supp. 51, and *AFL v. Watson,* 327 U.S. 582, where an unincorporated association was permitted to test the validity of a provision of the constitution of Florida. The court, however, found it unnecessary to pass on this point, finding jurisdiction under the commerce section.

The appellee union and its officers being an association of natural persons are entitled to protection against deprivation, under color of territorial law, of rights guaranteed by the Constitution and federal law.

They are therefore, as the District Court held, entitled to maintain a civil rights suit under Section 1343, without regard to jurisdictional amount, as are the individual appellees.

The District Court held that appellees' complaint set forth and that they proved a cause of action under the Civil Rights Act.

The substance of appellees' complaint is precisely the same as the complaint upheld in *Douglas v. Jeannette,* 319 U.S. 157. "In substance," the Supreme Court said,

> the complaint alleges that respondents proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of

> their rights of freedom of speech, press and religion secured by the Constitution, and the complaint seeks equitable relief from such deprivation in the future. . .

As to jurisdiction, the court said:

> "We think it plain that the district court had jurisdiction as a federal court to hear and decide the question of the constitutional validity of the ordinance. . .
>
> . . . the district courts of the United States are given jurisdiction by 28 U.S.C. Section 41 (14) over suits brought under the Civil Rights Act without jurisdictional amount. Not only do petitioners allege that the present suit was brought under the Civil Rights Act, but their allegations plainly set out an infringement of its provisions.

In effect appellants make the astounding assertion that a person shows no deprivation of the right of free speech by showing arrest and prosecution under a statute which abridges that right. According to this logic a member of the Jehovah's Witnesses sect could not complain of a deprivation of his right to distribute religious literature if in the course of distributing the literature he was guilty of an assault because he forced the door open against the householder's will. That he might be liable to prosecution for such an assault does not mean that he can be prosecuted under a statute which abridges freedom of worship.

A person has a right not to be arrested and prosecuted under laws that abridge freedom of speech; arrest and prosecution under such a void law constitutes a deprivation of a constitutional right, and he is deprived under color of law because the arresting officer acted by virtue of the authority the law purported to give him. Thus all the elements appellants say are necessary are present if the law complained of is unconstitutional.

Appellants have mesmerized themselves with their repeated assertions that the appellees seek only the right to violence and lawless conduct. Their state of mind under-

mines their legal scholarship. Even if it be assumed that some of the individual appellees are subject to prosecution under some valid law of the Territory, they are deprived of rights by being prosecuted under an invalid one.

Of course appellants' own witnesses refute the charge "deliberate use of mass force and violence" which they reiterate in defense of their conduct. It is a far cry from an incident at which nothing serious occurred, and as a result of which four or five persons might be charged with loitering, to the prosecution of eighty persons for a serious felony with a maximum of twenty years imprisonment.

Appellees' complaint not only raises the question of appellees' right to be free from intimidation and coercion in its exercise of the right to free speech, assembly and peaceful picketing by virtue of the void statutes. It also raises the question of the denial of equal protection implicit in having invoked against appellees statutes interfering with this right not invoked against other members of the community.[8]

The complaint further charges the misuse of power by appellants under color of law, that is, prosecutions not in good faith. Appellants' assertion to the contrary is surprising in view of the record. (B. 15-17) See *United States v. Classic,* 313 U.S. 299; *Screws v. United States,* 325 U.S. 91.

Thus, the complaint as amended (R. 3, 31) charges that the appellant Lane and his officers and agents charged appellees with

> purported violations of said unlawful assembly and riot act;

that appellants Ackerman, Bevins and Crockett sought to present

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[8] Appellants devote Section V (B. 75-82) of their brief to establish that appellees suffered no denial of equal protection of the law. Appellees agree that the equal protection clause of the Fourteenth Amendment does not apply to Hawaii. Appellees agree also that the due process clause of the Fifth Amendment protects them against discriminatory action by either legislative or administrative action. Equal protection and rights under the law is also accorded appellees by Section 41 of Title 8, Civil Rights Act.

> purported criminal charges for purported violations of the unlawful assembly act;

and that unless restrained, appellants will indict and place appellees on trial for alleged violations of said unlawful assembly and riot statute, and

> will purport to act under color of said statute.

"Purported" means under "the specious and deceptive appearance of intending or claiming." "Under color of" means "under pretense of." *Screws v. United States,* 325 U.S. 91.

Appellants understood that the question of bad faith was an issue, and undertook to refute the evidence of bad faith adduced by the appellees. In appellants' closing argument before the District Court, Miss Lewis stated:

> . . . Apparently there is some attempt to persuade the court that the defendants in this case, the prosecuting officers, are not proceeding in good faith; that they do not have the facts to back up these charges. Well, we have been in here and we submit we have shown probable cause for each and every charge sufficient that a jury should decide the conflicts in the testimony. Hence, why go into the questions of bad faith? Well, the plaintiffs will say: "Maybe in those cases it is one thing, but how do we know what you will do in the future?"

and again, Miss Lewis stated:

> . . . and we have some claim of bad faith which is met because we have shown what the proof is and what occurred, so that I think that redherring should be disregarded as well.

If misuse of power, that is, bad faith, will sustain a criminal charge under the Civil Rights Act, it cannot be disputed that bad faith is an element to be considered in a civil suit for deprivation of rights.

Denial of equal protection of the law is a deprivation of rights, which appellees showed. The evidence shows the repeated purposeful invocation of these two void laws for comparatively minor infractions of the law by appellants against the appellees.

The evidence also shows a general picture of the continuous selection of these laws for prosecution in cases growing out of labor disputes where its use seems inappropriate.

Appellants, by way of testimony introduced into the brief, cite a shocking case, uncovered since the hearing, of fifteen young men who, on a plea of guilty, were convicted under the unlawful assembly act where no labor dispute was involved. This case proves that the law is a danger, as the District Court said, to others in the community as well as laborers.

One such instance of the use of the statute under inappropriate conditions where a labor dispute is not involved, is scarcely enough to balance the scales which the statute has caused to be weighted so heavily against labor.

Appellees' Memorandum on Labor and the Law, Appendix I, shows the consistent and successful use of both these statutes in labor disputes for almost the full hundred years of their existence.

The record shows that the 1946 sugar strike was the first successful strike in the history of the Territory. The conclusion from the cases reported in appendix I is that the abuse of these criminal statutes played a substantial role in breaking the past strikes. See *Territory v. Soga,* 20 Haw. 71.

The removal cases cited by appellants (B., p. 51) are not applicable as tests of jurisdiction or quantum or nature of evidence under the Civil Rights Act. Thus, in *Screws v. United States,* the Supreme Court said:

> Nor are the decisions under Section 33 of the Judicial Code, 28 U.S.C.A. Section 76, 7 F.C.A. Title 28, Section 76, in point. That section gives the right of re-

moval to a federal court of any criminal prosecution begun in a state court against a revenue officer of the United States "on account of any act done under color of his office or of any such revenue law." The cases under it recognize that it is an "exceptional" procedure which wrests from state courts the power to try offenses against their own laws, citing cases. Thus the requirements of the showing necessary for removal are strict. See *Maryland v. Soper* (No. 2), 270 U.S. 36, 42, 70 L. ed. 459, 461, 46 S. Ct. 192, saying that acts "necessary to make the enforcement effective" are done under "color of law." Hence those cases do not supply an authoritative guide to the problems under section 20 which seek to afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States. *It is one thing to deprive state courts of their authority to enforce their own laws. It is quite another to emasculate an Act of Congress designed to secure individuals their constitutional rights by finely spun distinctions concerning the precise scope of the authority of officers of the law.* Cf. *Yick Wo. v. Hopkins,* 118 U.S. 356, 30 L. ed. 220, 6 S. Ct. 1064. (Italics supplied.)

Jurisdiction of the person and subject matter of the complaint indisputably exists under the *Hague* and *Jeannette* cases.

Appellee made out a case in equity, as the District Court found under Section 1343 of the new Judicial Code and the Civil Rights Act. Appellees' showing that the statutes are unconstitutional, that appellees have been deprived of rights under them, have been singled out for harsher treatment than other members of the community, have been prosecuted in bad faith and denied equal protection of the laws, a fair and impartial jury, and that the fear engendered by the statutes weakens, disrupts and threatens labor relations, meets all the tests ever exacted to invoke the exercise of equitable discretion.

2. Existence of Jurisdiction Under Section 1337 of Title 28 of the New Judicial Code.

The District Court also found jurisdiction existed under Section 1337 of Title 28 of the new Judicial Code, formerly Section 24 (8), 28 U.S.C.A. 41 (8), (R. 430-439, R. 477-484). This holding was based upon the showing of the impact of both the unlawful assembly and riot act and the conspiracy act, and the manner of their enforcement by appellants on labor relations in Hawaii.

Clearly, the gist of the appellees' complaint was the threat to the effectiveness and the very existence of the union implicit in such sweeping, all-embracive statutes, and the manner in which they were used by the appellants.

Thus, the appellee union and its two officers in representative capacities on behalf of all the members of the union, brought the suit "in order to protect and obtain the benefits of the Civil Rights Act and the Constitution of the United States for its members". The complaint alleged that in the course of labor disputes, the appellees engaged in lawful, peaceful and constitutionally protected activities of free speech, press and assemblage and of peaceful picketing; that the individual appellees were arrested under color or pretense of these void laws and charged by appellants with purported violations of these laws; that appellants sought to present or presented these charges to a grand jury illegally composed under federal and territorial laws; that unless appellants are restrained, appellees will be deprived of rights secured to them by the Constitution; that the appellees have spent thousands of dollars in the organization and establishment of a trade union, which cannot function and exercise its property rights and personal rights so long as its members are subject to indictment by an illegally constituted grand jury and subject to prosecution under statutes containing unconstitutional limitations on the right to picket because of the fear and intimidation of the appellees engendered by the threat of punishment for the exercise of

these rights guaranteed by the Constitution. (R. 3-20, 31-33; 12,301, 4-27)

Not only appellees' complaint but all the evidence of appellees showed the devastating effect of these laws and their impact upon labor relations.

In *American Federation of Labor v. Watson,* 327 U.S. 582, where suit was brought alleging a deprivation of rights because of a conflict with a provision of the Florida Constitution with rights under the First and Fifth Amendments and the National Labor Relations Act, a three-judge federal court found jurisdiction under Section 24 (1) and 24 (14) of the old Judicial Code. The Supreme Court, however, did not pass on the existence of jurisdiction under these provisions of the code but based jurisdiction on Section 24 (8), the predecessor of 1337.

Appellees here did not allege jurisdiction under Section 24 (8) of the old Judicial Code nor conflict with the National Labor Relations Act. The identity of the rights of association under the First Amendment and that Act appears in *National Labor Relations Board v. Jones & Laughlin Steel Company,* 301 U.S. 1. The complaints set forth and the evidence fully supports the District Court's finding of jurisdiction and of facts supporting that jurisdiction.

Appellants misapprehend the law when they assert that the District Court was without power to base jurisdiction on 1337 because the complaint did not allege jurisdiction under this section.

Rule 15 (b) of the Federal Rules of Civil Procedure allows amendments to conform to the evidence even after judgment.

The federal rule covering amendments is to be liberally construed, and should be allowed where the interests of justice will be served. An amendment which makes no change in the facts relied upon for recovery, but which merely alters the remedy or result of the facts alleged, it has been held, states no different cause of action and is proper.

Amendments may be made at any time while the court has jurisdiction, even after judgment; and *upon appeal* the appellate court *may regard a pleading as having been amended to conform to the proof.* These principles are well established. *McAllister v. Sloan,* 81 F. (2d) 707. In that case, it appeared that the plaintiffs, in drawing their complaint, proceeded on a theory of recovery under a statute, but stated sufficient facts to make out a cause of action at common law. The court's opinion contains an exhaustive summary of authorities:

> . . . The practice of the federal courts is to permit amendments in all judicial proceedings where they are necessary to enable parties to reach the merits of the controversy they attempt to present, and where the allowance of the amendments will work no injustice. *In re Plymouth Cordage Co. et al.* (C.C.A.) 135 F. 1000, 1003; *Woodard v. Outland,* supra, 37 F. (2d) 87, 89. Amendments to pleadings are freely allowed where they are in furtherance of justice. The propriety of such amendments is a matter of discretion with the trial court, and its determination will not be disturbed unless it appears that its discretion has been unwisely exercised and that its action was not, under the circumstances, in furtherance of, but a detriment to justice. *Schulenberg v. Norton,* (C.C.A. 8) 49 F. (2d) 578, 579. Amendments may be made at any time while the court has jurisdiction, even after judgment; and upon appeal *the appellate court may regard a pleading as having been amended to conform to the proof. Schulenberg v. Norton,* supra, 49 F. (2d) 578, at page 579. An amendment which makes no change in the facts relied upon for recovery, but which merely alters the remedy or result of the facts alleged, states no different cause of action and is proper. *Schulenberg v. Norton,* supra, 49 F. (2d) 578, at page 579; *Missouri, Kansas & Texas Ry. Co. v. Wulf,* 226 U.S. 570, 33 S. Ct. 135, 57 L. Ed. 355; *New York Central & Hudson River R. Co. v. Kinney,* 260 U.S. 340, 43 S. Ct. 122, 67 L. Ed. 294; *Manhattan Oil Co. et al. v. Mosby* (C.C.A. 8) 72 F. (2d) 840, 843. (Italics supplied.)

The authorities amply support the power of the District Court to give judgment in accordance with the facts.

3. Jurisdiction Under Section 1331 of Title 28 of the New Judicial Code.

Appellants' statement of the court's finding of jurisdiction is confusing (B. p. 45). The court's ruling that jurisdiction existed without regard to jurisdictional amount under Section 1343 and 1337 applies to the union appellee as well as to the individual appellees. The findings as to the jurisdictional amount in notes 1 (R. 371) and 5 (R. 377-378) were alternative findings in event the reviewing court disagreed with the District Court's conclusion that jurisdiction existed under Section 1343 and 1337 of the new code.

The amended complaint in 12,300 (R. 2-24, 31-34) and the complaint in 12,301 (R. 2-27) allege that the case or controversy exceeds as to each plaintiff the sum of $3,000. Appellants denied this.

The District Court found that the union appellee had established the jurisdictional amount, but that the damages to the individual appellees were not cognizable in monetary terms.

If this Court finds that jurisdiction as to the union appellee cannot be founded on 1343, jurisdiction has been established under 1331 of the Revised Code, 24 (1) of the old code.

There is no question as to the individual appellees' right under Section 1343.

Section 1359 of Title 28 of the new Judicial Code cited by appellants (B., p. 46) can have no conceivable application since it deals with collusive joinder of plaintiffs.

C. The District Court Had Jurisdiction to Hear and Determine the Case, Notwithstanding the Provisions of Section 2283 of Title 28 of the New Judicial Code and Section 265 of the Old Judicial Code.

The District Court held that Section 2283 of the new Judicial Code, Section 265 of the old Judicial Code, do not

deprive federal courts of jurisdiction to enjoin proceedings in state courts. (R. 469-472)

Both appellants and the Bar Association take the position that Section 2283 of the new Judicial Code deprives the District Courts of jurisdiction, that is *power,* to enjoin the enforcement of the statutes declared void and the threatened action of appellants in presenting charges to the grand jury under these statutes in 12,300 and to enjoin proceedings against the individual appellees in 12,301 under the indictment under these void statutes returned by the unconstitutionally composed grand jury.

The Bar Association brief states:

> A United States District Court may not enjoin criminal proceedings pending in state courts because of congressional prohibitions against such intervention. This is so, irrespective of the circumstances surrounding the state court criminal proceedings, the methods or motives of state prosecuting officers, or any other factors. (p. 4)

Appellants submit, by reason of the prohibition of Section 2283,

> that a federal equity court cannot enjoin pending state or territorial criminal prosecutions, that it lacks jurisdiction to do so. (B. p. 40)

These are remarkable statements in the light of history.

Section 265 of the old Judicial Code has long been held to be a rule of comity. In an article entitled "The Power of Federal Courts to Enjoin Proceedings in State Courts," 42 Yale Law Journal 1168, at page 1172, it is stated:

> The Supreme Court has flatly declared that Section 265 is not a limitation upon the jurisdiction of the federal courts, but is merely a restriction upon the exercise of their power to grant equitable relief. This constitutes an open avowal that even though the sole object of a federal suit is to enjoin proceedings in a state court, the

> federal court must nevertheless inquire into the merits of the controversy and determine whether or not the relief should be granted.
> *Smith v. Apple,* 264 U.S. 274. Accord: *Sovereign Camp Woodmen of the World v. O'Neill,* 266 U.S. 292; see *Russell v. Detrick,* 23 F. 2d 175, 178 (C.C.A. 9th, 1927).

Curiously, the Bar Association, in note 7 at page 37 of its Brief, exposes the speciousness of the argument, made as a flat assertion, that Section 265 of the old Judicial Code is jurisdictional and not a rule of comity as construed by the Supreme Court. In that note, it is pointed out that an unsuccessful attempt was made in Congress in 1910 to deprive federal courts of the jurisdiction they had asserted and exercised for over 100 years to enjoin the enforcement of state statutes. Instead, the existing judicial construction was legislatively sanctioned, but with new procedural requirements. To guard against the improvident issuing of injunctions against the "enforcement, operation or execution" of state stattues, the three-judge court requirement was adopted. This provision did not, of course, enlarge equity jurisdiction, but neither did it narrow it. The words "enforcement, operation or execution" of statutes comprehends criminal as well as civil statutes and proceedings.

The position of appellants and the Bar Association is particularly remarkable in the light of *Hague v. CIO,* 307 U.S. 496, *Bevins v. Prindable,* 39 F. Supp. 708, affirmed, 314 U.S. 573, and *Douglas v. Jeannette,* 319 U.S. 157, which hold that Section 43 of Title 8 gives federal district courts jurisdiction of suits in equity to restrain state officers, acting under color of state laws, from infringing on rights guaranteed by the Constitution and federal law.

In *Hague v. CIO,* 307 U.S. 496, Mr. Justice Stone stated:

> . . . the right to maintain a suit in equity to restrain state officers, acting under a state law, from infringing the rights of freedom of speech and assembly guaran-

> teed by the due process clause, is given by Act of Congress to every person within the jurisdiction of the United States whether a citizen or not, and such a suit may be maintained in the district court without allegation or proof that the jurisdictional amount required by Section 24 (1) of the Judicial Code is involved.

Whether the court should exercise its discretion to grant the relief prayed depends on whether the petitioner establishes a cause of action in equity. But there is no artificial distinction to be made between state officers threatening to act under color of law, and state officers acting under color of law.

In *Douglas v. Jeannette,* 319 U.S. 157, Mr. Justice Stone, writing for the majority, said:

> . . . the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury "both great and immediate."

To make out their theory that federal district courts have no jurisdiction to stay state court proceedings under criminal laws in violation of the federal Constitution, appellants and the Bar Association have to play hopscotch through the cases. It is clear that they jumped all the cases decided under the Civil Rights Act on which appellees' suit is based.

After noting exceptions engrafted on what they contend is the statutory prohibition by judicial decision and statute, both appellants and the Bar Association buttress their contention that the statute removes jurisdiction from federal district courts to enjoin civil and criminal proceedings in state courts by what they describe as the doctrine of *Cline v. Frink Dairy Co.,* 274 U.S. 445, and *Ex Parte Young,* 209 U.S. 123.

In the *Cline* case, a federal three-judge court held unconstitutional a state anti-trust law and restrained its enforce-

ment both in pending and threatened prosecutions. The Supreme Court held that a case for the exercise of equitable jurisdiction had been made out and that the statute was unconstitutional. It modified the injunction in so far as it was directed against the pending prosecutions.

Appellants seek to prove too much. First, clearly if the Supreme Court of the United States, or a federal district, or circuit court, declared a state criminal statute unconstitutional on its face and restrained its enforcement, it would be a fool-hardy state prosecutor indeed who would attempt thereafter to procure convictions in pending prosecutions under the voided statute. In fact, the court in the *Cline* case noted that the objection would lead only to a narrowing of the decree.

The voiding of the statute and the restraining of its enforcement accomplishes the purpose. In *Hague v. CIO,* the court said:

> As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners.

In *Douglas v. Jeannette,* the court, referring to its decision of the same day in the *Murdock* case declaring the challenged ordinance void, said:

> There is no allegation and no proof that respondents would not, nor can we assume they will not acquiesce in the decision of this court holding the challenged ordinance unconstitutional as applied to petitioners.

Second, it appears from the *Cline* case that the plaintiff complained to the federal court that the state officers threatened to and were about to present evidence to the grand jury to procure indictments under the void statute.

This is exactly what the appellees complain of in case No. 12,300. Prosecution of these appellees could only be by indictment under the requirements of the Fifth Amend-

ment. After the District Court had assumed jurisdiction in 12,300 and issued a restraining order based on the substantial showing of the unconstitutionality of the statute and the illegality of the method of selection of the grand jury against the appellants Crockett and Bevins and the grand jurors, and while they were so restrained, the indictment against the individual appellees in 12,301 was returned under the challenged statute by the challenged grand jury. It is noteworthy that the appellees in 12,300 were before the court as members of the class represented by the union and Kawano in his representative capacity for all the members of the union.

It is rather difficult to square this with the principles of comity.

Thus, under the doctrine of the *Cline* case, the District Court, having acquired jurisdiction of the litigants and the subject matter, could stay the proceedings to protect its own jurisdiction previously acquired. *Ex Parte Young,* 209 U.S. 123.

Third, it is also noteworthy that in the *Cline* case both the three-judge court and the United States Supreme Court, finding the challenged statute unconstitutional on its face, and a cause of action in equity made out, saw no necessity for awaiting an authoritative construction of the statute in the pending prosecution in the state court.

The decrees in these cases declare the statutes void and restrain their enforcement against the individual appellees, and through the union appellee and the class representatives, all the members of the union under any complaint or indictment based on the laws declared void.

Appellants' assertion that the District Court "seems to have been of the view that the bringing of the present cases under the Civil Rights Act enlarged the scope of its equity jurisdiction" (R. 480) is unwarranted and unsubstantiated by anything the court said. The only meaning that can be ascribed to this assertion is that appellants disagree with the

court that good faith is material under the Civil Rights Act.

In both *Hague v. CIO* and *Douglas v. Jeannette,* the Supreme Court made no specific reference to Section 265 of the old code. In both cases it cited Section 43 of Title 8 as the statutory base for the maintenance of the suit.

Appellees have no quarrel with the assertion that the Civil Rights Act did not enlarge equity jurisdiction of the federal court, but it clearly gave federal district courts jurisdiction in law and equity of causes of action within its scope.

Appellants seem to feel that since Section 265 of the old Judicial Code was adopted in 1793 it thereupon modified existing standards of a cause of action in equity. The logic is the other way.

The fact that the Civil Rights Act was adopted after the code section indicated an intention to engraft a statutory exception to Section 265 where a cause of action in equity was made out. As we have seen, this is the construction that the Supreme Court has given the Civil Rights Act.

Appellants assert that the lower court held that a bill in equity confers greater powers of intervention in pending state criminal cases for the protection of civil rights than does the removal statute, "it being only necessary, according to this holding, that petitioner ignore the ancillary nature of such an equity bill, whereupon the federal court will find itself free of all statutory limitations." (B., 90-91)

Perhaps losing litigants, like poets, having a certain license. If such license exists, it has been stretched pretty far here.

The District Court stated that it was of the opinion that decisions controlling the removal of civil rights cases to the federal courts are not persuasive in these cases.

The question presented, the court said, is not whether the case of *Territory v. Kaholokula* may be removed to the federal court, but whether, in a suit based upon the Civil Rights Acts, this court may consider whether appellees have been deprived of rights guaranteed to them by the Consti-

tution of the United States by reason of the methods employed in the selection of the 1947 Maui County Grand Jury.

That the removal statutes are not an "authoritative guide to the problems under section 20 which seeks to afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States," was specifically held in *Screws v. United States,* 325 U.S. 91.

Appellants also invoke habeas corpus proceedings to buttress their contention that the District Court committed "error of the first magnitude" in giving "unlimited scope to a non-existent equity power of intervention expressly prohibited to be used."

But in habeas corpus proceedings, as in suits in equity under the Civil Rights Act, there can be no question of the power of the federal courts to act, and their discretion is based on the circumstances of the case. This was made very clear by the Supreme Court in *Ex Parte Royall,* 117 U.S. 241, in which it was held that federal courts have jurisdiction to discharge on habeas corpus before trial a person who is restrained of his liberty in violation of the Constitution of the United States, and who is held under state process for trial on an indictment charging him with an offense against the laws of the State. Because of the facts in the case, the Supreme Court did not reverse the denial of the writ, but qualified the discretionary power of the lower court, saying:

> The circuit court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; *that discretion, however, to be subordinated to any special circumstances requiring immediate action.* (Italics ours.)

In suits in equity to redress deprivation of constitutional rights, like in habeas corpus proceedings, the question is

not of the jurisdiction of the federal court, but whether a case is made out in which the equitable jurisdiction should be exercised as a matter of discretion.

Beal v. Missouri Pacific R. Corp., 312 U.S. 45, 85 L. ed. 577, decided in 1940, fourteen years after the *Cline* case, states the rule:

> Interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury.

This rule was cited and confirmed in *Watson v. Buck,* 313 U.S. 387, 85 L. ed. 1417, by the Supreme Court and again in affirming *Bevins v. Prindable,* 39 F. Supp. 708, at 314 U.S. 573.

Section 2283 does not oust federal courts of jurisdiction in suits to grant injunctive relief against criminal proceedings in a state court. Under the Civil Rights Act, the federal courts are given jurisdiction to redress deprivation of constitutional and federal rights and are bound to grant relief if a showing is made that a state officer acting under color of law deprives a person of rights and exceptional circumstances exist and a showing of irreparable injury is made. Failure to exercise discretion in a proper case is reversible error. *AFL v. Watson,* 327 U.S. 582, *Toomer v. Witsell,* 334 U.S. 385.

D. The Union and Class Representatives Are Proper Parties.

The District Court considered the appellants' contentions that the union and class representatives are not proper parties at all stages of the proceedings, and overruled the objections. It held that the union and class representatives are proper parties by direct holding of the Supreme Court in

American Federation of Labor v. Watson, 327 U.S. 582. (R. 513-515.) Both *Douglas v. Jeannette* and *Bevins v. Prindable,* where the jurisdiction of the court over the cause of action and the parties was upheld, were class suits.

Appellants' contention with respect to *Hague v. CIO* has already been discussed, supra, pages 28-29. See also *Stapleton v. Mitchell,* 60 F. Supp. 51.

An unincorporated association is nothing more in contemplation of law than the individuals who compose it.

Appellees showed the impact of the actions of appellants on every phase of its activities, and the fear and intimidation of its members resulting from the actions under color of these two statutes of appellants.

At the instance of the appellant Attorney General, the Legislature of the Territory of Hawaii in 1949, after the decision and decrees of the court, repealed both the unlawful assembly act and the conspiracy act declared void by the court, and substituted new laws, except as to the 127 individual appellees against whom the Territorial Legislature attempted to preserve the right to proceed with prosecutions, even though motivation for the repeal was the declared unconstitutionality of the statutes by the three-judge court.[9]

It was noted by both the House and Senate reports that the penalty was excessive. This was conceded before both Houses by the appellant Attorney General.

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[9] A bitter fight developed in the House of Representatives on the attempt to re-enact the unlawful assembly and riot act declared unconstitutional by the court. The Minority Report of the House Judiciary Committee is set forth in Appendix II. The vote on the Bill in the House was 19-10 for enactment.

The unlawful assembly act as it existed at the time of the court's decision is set forth in full in Appendix I of the Appellants' Opening Brief, pp. 188-192. The Repealing Act and the new text is set forth in Appendix III of Appellants' Opening Brief, pp. 192-195. The Conspiracy Statute, as it existed at the time of the court's decision, appears in Appendix IV, pp. 195-198 of Appellants' Brief, and the repealing and amending act is set forth in Appendix V, pp. 198-200.

That the re-enactment of these two statutes was at the instance of the appellant Attorney General appears from the Majority Report of the House Judiciary Committee:

> This bill is an administration bill prepared and drafted by the Office of the Attorney General of the Territory of Hawaii. The purpose of this bill is to re-define the crime of "riot" by increasing the number necessary to constitute a riot from "three or more" persons to "six or more" persons; to decrease the penalty therefor from "twenty" years to "two" years; to amend Section 11581 of the Revised Laws of Hawaii 1945 and making it a misdemeanor to remain present at a place of riot after being ordered to disperse; and to repeal the remaining sections of Chapter 277.

The fact that only members of the appellee union can be prosecuted under the two void acts, increases rather than diminishes the threat of irreparable injury to the appellees.

There can be no question that a justiciable controversy exists. The right to be free from prosecution under color of territorial law of statutes infringing on constitutional rights, and to equal protection of the laws is the right of every person.

Even apart from the threat to appellees from the enforcement of the statutes, the right to a representative grand jury selected in accordance with constitutional standards is the right of every person. The denial of this right is in and of itself a denial of the equal protection of the laws. *Neal v. Delaware,* 103 U.S. 370; *Smith v. Mississippi,* 162 U.S. 592.

E. The Doctrine of Clean Hands Has No Application to These Cases.

Appellants assert that this equity maxim is applicable here, and that the court misunderstood the maxim. (B. 100-103)

The court discusses the question fully in its decision, and holds the doctrine inapplicable. (R. 485-486)

As we have seen, appellants' witness, Assistant Chief of Police Freitas, testified that he stated in his official report that nothing serious occurred during the Paia incident; that possibly four or five persons might be charged to make a test case out of the loitering law. He told the picketers at the time that if any breaches of the peace occurred, arrests would be made. Twenty police officers were present and no arrests were made.

Yet, 79 persons were subsequently indicted under the 20-year felony statute in the first indictment, and 75 persons were charged under both statutes in the second indictment.

In the recent case of *Toomer v. Witsell,* 73 F. Supp. 371, 334 U.S. 385, the question of the application of the maxim to a suit for equitable relief against an allegedly unconstitutional statute was considered.

The specially constituted three-judge court said:

> Defendants point to the fact that certain of plaintiffs have been found guilty of criminal violation of the statutes and say that in proper application of the clean hands doctrine they should not be heard by a court of equity. It is well settled, however, that courts of equity "do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, id., § 100. Pomeroy, id., § 399. They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240, 245, 246, 54 S. Ct. 146, 147, 78 L. Ed. 293; *Mas v. Coca Cola Co.,* 4 Cir., 163 F. 2d 505. The matter involved in suit here is the constitutionality of the statutes complained of by plaintiffs, and neither this

> question nor the equitable relationship of the parties could possibly be affected by plaintiffs' disobedience of the statutes; and, at all events, the matter is one resting in our discretion and we should not exercise that discretion to refuse a hearing to one who complains that state legislation affecting others as well as himself is violative of rights guaranteed by the Constitution of the United States.

The Supreme Court affirmed this decision, saying:

> Some of the individual appellants had previously been convicted of shrimping out of season and in inland waters. The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree.

Appellants assert flatly that the court has no power to look to their bad faith, but yet insist that because some infractions of the law occurred, they can with impunity violate and deprive appellees of their constitutional rights.

F. Bad Faith of the Prosecutions Was Properly Considered by the District Court as an Element of Appellees' Showing of Exceptional Circumstances and Irreparable Injury. (B. 103-134, amicus brief 40-49.)

Appellants advance the novel contention that the opposite of good faith prosecution is not prosecution in bad faith, and that a federal court cannot interfere with the exercise of power by state law enforcement officers. (B., pp. 103-109.)

Again appellants seek to invoke the removal cases to support their contention. As we have shown, they are inapplicable in suits to redress deprivation of rights under color of law. Action in abuse of power held because an officer is clothed with the authority of the law makes the plainest case of violation of civil rights.

The District Court came to the conclusion that the action taken by appellants was not in good faith. (R. 480-483.) Its

findings are amply supported by the record. Its conclusion is supported by the Supreme Court decisions under the Civil Rights Acts.

In *United States v. Classic,* 313 U.S. 299, the court said:

> Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of law.

The Civil Rights Act provides both civil redress and criminal sanctions against action of state officers under color of law. The criminal counterpart of Section 43 is Section 20 of the old criminal code. Section 242 of Title 18 provides:

> Deprivation of rights under color of law
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory ,or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishments of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

In construing this section, which is dealing in *pari materia* with Section 43 of Title 8, in *Screws v. United States,* 325 U.S. 91, the court said:

> Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

After rejecting the tests of the removal statute as a guide to the interpretation of Section 20, the court continued.

> Hence those cases do not supply an authoritative guide to the problems under § 20 which seeks to afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States. It is one thing to deprive state courts of their authority to enforce their own laws. It is quite another to emasculate an Act of Congress designed to secure individuals their constitutional rights by finely spun distinctions concerning the precise scope of the authority of officers of the law.

It is clear that all of the actions found by the court in support of its conclusion that the prosecutions against appellees by appellants were not in good faith are actions taken under color of law and in abuse of law. The District Court's refusal to dismiss as to appellants Bevins and Crockett after they ceased to hold office was therefore proper.

This was the very purpose for which Section 43 was designed—to provide redress for persons deprived of rights secured by the Constitution or laws of the United States.

It is the duty of a federal court to see that federal rights are protected in substance as well as in form. In *Norris v. Alabama,* 294 US.. 587, the Supreme Court said:

> When a federal right has been specially set up and claimed in a state court it is our province to inquire not whether it was denied in express terms, but also whether it was denied in substance and effect.

Surely a federal court has the same duty when it is the trier of facts.

In *Yick Wo v. Hopkins,* 118 U.S. 356, the Supreme Court made it clear that there is no room in our constitutional government for purely arbitrary and personal power. The court said:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of

> their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

The petitioner was discharged on a writ of habeas corpus from imprisonment under a state law held to be valid and which appeared on its face to be valid. As enforced, however, it was directed against only persons of one group or class—Chinese subjects.

The court held:

> In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Appellants urge that the District Court is putting the people of Hawaii on trial. Appellees disagree.

Appellants are four law enforcement officers who have acted in abuse of the power they possessed by reason of their office.

Who are the *people* of Maui County—the 80% of laboring men who have been excluded from jury service, been singled out for harsh and abusive treatment by local law enforcement officers, and who are libeled and reviled with bitter hatred by appellants because they seek to secure the benefit of the United States Constitution for themselves and their fellows? Or the four appellants who, in their exercise of arbitrary power in defiance of the Constitution, attempt to wrap themselves in the sovereignty of the people?

The District Court's finding that the treatment accorded appellees was for the purpose of attack upon a labor movement is inescapable on the basis of the record before the court.

It is not the people of Hawaii who are impeached, but appellants; their conduct has impeached them.

The record of the abuse of law enforcement in Hawaii against labor from court cases is shown in Appendix I. How any fair-minded person could or would try to justify the outrages there apparent, and equally apparent in these cases, is difficult to understand.

Both the appellants and the Bar Association condone the practice of special prosecutors.

Private vengeance should have no place in the criminal law. The fiction of supervision indulged in by the Supreme Court of Hawaii is a sad substitute for impartiality in the administration of justice for the welfare of society rather than for private clients of an attorney in private practice.

A special prosecutor hired by the Hawaiian Sugar Planters' Association, *Territory v. Crowley,* 34 Haw. 774, sent a newspaper editor to jail for charging that a former general, hired by the H.S.P.A., deceived the Filipino workers and got them to call off their strike, and there would be peace, and then hired special prosecutors to secure convictions of the leaders.

The editorial charged in part:

> General 'Blank' it was who, trading on his military title and prestige, made peace with the 4,500 Filipino workers on Maui two months ago.
>
> Promised by him, say Filipino leaders, was end of HSPA war upon workers, end of court persecution.
>
> Now, with open charges, undenied, that General 'Blank' lied and deceived workers who trusted to the honor of the U. S. Army, Maui is again on the verge of ferment.
>
> Instead of peace, General 'Blank' swings the HSPA sword, hurls HSPA mercenaries into the court to convict the Filipino leaders.
>
> And 60,000 Filipino workers cry out, send word to Manila, and all over their homeland, that America is a land of persecution, ruled by unprincipled and revengeful men.
>
> Over all their homeland goes word that American generals are liars and deceivers, schemers to oppress and imprison Filipinos who are innocent.
>
> . . . . . .
>
> The Maui case has been a disgrace to the people of Hawaii.
>
> It has been a travesty on American justice, for in it public power has been seized and used ruthlessly for private terrorism and revenge.
>
> It has been a shame to the Roosevelt administration through connivance for wrong by the highest governmental powers in the Territory, the governor and the attorney general of Hawaii.
>
> It has been a signal to the Filipino people that their sons here will be victimized, abused, robbed of their rights and liberties under pretense of law and order.

A remarkable doctrine of criminal law was developed in this case: that the burden of proof rests on the defendant under Hawaii's criminal libel law.

Associate Justice Peters, dissenting, said:

> Both defendants should be granted a new trial. The trial court committed reversible error by instructing

> the jury as requested by the prosecutor that it was incumbent upon the defendants to prove justification by a preponderance of the evidence. . . . It is axiomatic that in a criminal case it is incumbent upon the prosecution to prove all of the essential ingredients of the offense charged beyond a reasonable doubt.

This practice of permitting private clients to have their lawyer serve as an advocate in a criminal trial is used and abused almost daily, particularly in the police courts where most defendants are not represented by counsel.

It is difficult to find a satisfactory rationale for the practice consistent with due process of law and a fair and impartial trial.

Appellants' Memorandum on Labor and the Law shows the almost invariable use of private-hired prosecutors in cases arising out of labor disputes prior to 1946. Since then, special deputy attorney generals have been hired by the Attorney General to prosecute charges of contempt of anti-picketing restraining orders, for the County of Kauai and the City and County of Honolulu.

Appellants engage in afterthoughts of evidence which, if true, should properly have been brought out on cross-examination in respect to the testimony of Jack W. Hall.

No one should know better than appellants that the pineapple strike was broken after five days, they deserve such a lion's share of the credit.

Appellants exclaim in italics that some of the arrests in the Lanai harbor incident were made more than two weeks after the pineapple strike was over, and therefore could not have affected the strike. Appellants forget the medium of the press: the machine guns, tear gas and riot squads brought with a fanfare of publicity. (See reference to Hilo riot squad, R. 1677.)

The background of the harbor incident carries a strong inference of an attempt to provoke the strikers:

1. The dispatching of a barge, ordinarily carrying 152 bins of pineapple, from Honolulu to load 11 crates of six-day old pineapple, when pineapple is shipped within 48 hours.

2. The strategic placing of three photographers.

3. The presence of company executives to perform the loading operations.

A thoughtful or planned course would have dictated that the most effective weapon for the strikers would have been for them to sit on the sea wall and laugh, while the company executives loaded the 11 bins of six-day old pineapple, fit only for waste products, worth less than the cost of transportation.

Likewise, at the trivial incident at Paia, it is difficult to deduce what five employees out of an ordinary force of 1,000 laborers could do in a closed sugar mill.

A sugar plantation with its thousands of acres bears little resemblance to a factory in a crowded industrial zone of a city. A company town bears little resemblance to an industrial city.

The employees of the company make up the population of the town. When the company is working, the life of the community revolves around the company. When the employees are striking, the life of the community revolves around the strike.

As a result of the Paia incident, 75 men were charged with the 20-year felony of unlawful assembly and riot as an aftermath of an incident during which no blows were struck, the police read the loitering law to the pickets, but did not order them to disperse, and no arrests were made, although 20 police officers were present. The whole trivial incident lasted less than three minutes.

The Kalua incident involves an assault and battery on 2 men, yet as a result of the incident, 5 men were charged with unlawful assembly.

The harbor incident, which lasted less than five minutes, resulted in at most two assault and batteries and in some pineapples being thrown out of bins.

Yet, as a result of these three incidents, 127 persons are faced with the felony of unlawful assembly and riot, loss of political rights and deportation for the non-citizens.

That the appellants do not in good faith believe that conviction under such charges are necessary to satisfy the ends of justice is proved by the Yamauchi incident, as a result of which 21 men were indicted for unlawful assembly and riot and conspiracy. After the strike was over, appellants nolle prossed the felony charges and fines were imposed on pleas of nolo contendere to assault and battery charges.

On the basis of these records, the invocation of a twenty-year felony statute is so obviously inappropriate that the conclusion that the prosecution was not for the ends of justice is inescapable.

In addition to the assault and battery statute and the affray statute, there are two territorial statutes, other than the unlawful assembly and riot act, which purport to authorize punishment for rioting and loitering: Section 11773, Revised Laws of Hawaii 1945, and Section 11771, Revised Laws of Hawaii 1945. The latter section provides that every person who is dangerous or disorderly by reason of being a rioter, disturber of the peace, going offensively armed, uttering menaces or threatening speeches or otherwise, is a vagrant and shall be punished by a fine of not less than ten dollars nor more than $500, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Thus the prosecuting officers and the grand juries, under existing statutes, can choose to charge rioters for exactly the same offense as a misdemeanor or a felony, leaving in their sole discretion which groups shall be singled out for harsh and discriminatory treatment.

The appellants seek to justify the practice of charging serious felonies on sworn complaint where no evidence ex-

isted at the time the complaint was sworn to; sworn complaints by an officer that over fifty persons were guilty of a serious felony when his official police report of the incident reports that nothing serious happened.

Appellants object to the finding of the court as to excessive bail. The amounts speak for themselves. It is to be noted also that $1,000 bail was required of Awana in the Paia incident (R. 1281).

Appellants, grasping at any straw, assert that the fact that after the bank refused to cash the $7,000 check of Mr. de la Cruz and that money was raised from businessmen undermines the court's findings as to the economic structure of Lanai.

Appellees' Appendix I shows the persistent and consistent use of the unlawful assembly and riot act and the conspiracy act in labor disputes for the 100 years of their existence.

The fact that after the hearing, appellants discovered that fifteen boys were convicted on a plea of guilty under an obviously inappropriate use of the statute scarcely overcomes the overwhelming evidence of its repeated and inappropriate selection as a vehicle for prosecution of minor infractions of the law in labor disputes.

Appellants characterize the haste with which the appellant Crockett procured the second indictment as a mere irregularity. Conveniently, no mention is made of the contemptuous conduct toward the District Court in procuring the indictment while under restraint in the companion case involving identical issues.

The District Court accepted the testimony of appellants' witness on all disputed facts. Its judgment is a considered ruling that, placing the construction on the facts most favorable to the appellants, the prosecutions were not in good faith.

II. THE UNLAWFUL ASSEMBLY AND RIOT ACT IS UNCONSTITUTIONAL ON ITS FACE AND AS EXTENDED IN SCOPE AND EFFECT BY THE DECISION OF THE SUPREME COURT OF THE TERRITORY OF HAWAII.

A. The Act is Unconstitutional on Its Face.

In *Watson v. Buck,* 313 U.S. 387, the Supreme Court stated that:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Unlawful Assembly and Riot Statute, Chapter 277, Revised Laws of Hawaii, repealed except as to the appellees in these cases, is such a statute.

Its counterpart has been specifically so declared by the United States Supreme Court. Its unconstitutionality is apparent by the standards laid down in all First Amendment cases. But the court in *Bridges v. California* struck this statute down as explicitly as words allow.

Of course, where a statute is unconstitutional on its face, it needs no construction.

> *Cline v. Frink Dairy Co.,* 274 U.S. 445.
> *Hague v. CIO,* 307 U.S. 496.
> *Thornhill v. Alabama,* 310 U.S. 88.
> *Toomer v. Witsell,* 334 U.S. 385, 392, note 15.

The reason why a statute void on its face needs no construction was pungently explained in *Giles v. Harris,* 189 U. S. 475, 487, a suit in equity under the Civil Rights Act, where it was said:

> If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent.

In *Near v. Minnesota,* 283 U.S. 697, and *Grosjean v. American Press Co.,* 297 U.S. 233, the Supreme Court warned in clear and unequivocal language that the common law of England in respect to free speech, free thought, free assembly and religion was not ours and was specifically rejected by the framers of the First Amendment.

In *Cantwell v. Connecticut,* 310 U.S. 296, the Supreme Court struck down an application of the common law concept of breach of the peace as violative of free speech, saying:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this Nation have ordained in the light of history that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The first case to challenge directly the police power of the state to legislate to prevent riots and unlawful assemblies was *Hague v. CIO,* 307 U.S. 496. Although the court several years earlier in the *Davis* case had upheld the power of Massachusetts to prohibit if it saw fit assemblies on the Boston Common, in the *Hague* case the court held void on its face and restrained the enforcement of an ordinance of Jersey City which authorized the Director of Public Welfare to issue permits for meetings in parks although his power to deny permits was strictly limited to cases where he felt it necessary for the prevention of riots, disturbances and disorderly assemblies.

In *Bridges v. California,* 314 U.S. 252, the Supreme Court said in specific language, that the restrictions on assembly prevalent in England at the time of the adoption of the Bill of Rights, specifically, the Riot Act of George I, stat. 2., c. 5., were measures which the Constitution prohibited the American Congress from passing.

The full text of the territorial Unlawful Assembly and Riot Statute is set forth in the opinion of the District Court, and likewise the text of George the First's Riot Act.

The District Court discusses fully the provisions of both acts, and finds a startling resemblance between the two, with the scales weighted more heavily in favor of assembly in the Riot Act of George I than in the Act adopted in 1850 by the King-appointed House of Nobles and Representatives of the Kingdom of Hawaii.

The declaration of unconstitutionality by the court in the *Bridges* case could not be more clear and explicit. The court said:

> In any event it need not detain us, for to assume that the English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' (Citations.) . . .
>
> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or *the restrictions* upon assembly[10] then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. . . .

So great was the danger from these laws that every vestige of popular liberty would have been destroyed, Buckle reports in his "History of Civilizations in England," referred to in the note in the *Bridges* case, but for "the bold spirit with which our English juries, by their hostile verdicts, resisted the proceedings of government, and refused to sanction laws which the crown had proposed, and to which a servile legislature had willingly consented."

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[10] Geo. I., stat. 2, c. 5, cf. also 36 Geo. III, c. 8, and discussion in I Buckle, *History of Civilization in England,* 351.

So armed with the supreme law of the land, the appellees at No. 12,301, after their challenge was overruled, went confidently to the Supreme Court of the Territory of Hawaii.

An interlocutory appeal is an extraordinary procedure and certainly one in which no lawyer would engage unless confident of a favorable outcome of the proceedings.

The federal law was clear and the history of the origin of the local statute made the outcome more clear.[11]

The Unlawful Assembly and Riot Act and Peonage or Penal Labor Act were adopted the same year.

As appears from appellees' Memorandum of Labor and the Law, in 1890 there were 7,612 male contract laborers in Hawaii. During that year, there were 5,706 arrests for deserting servitude and 5,389 convictions.

The use of the unlawful assembly and conspiracy statute during this period is also described. Whenever disturbances occurred on plantations in protest over conditions and wages, the leaders were charged with riot. As a result of the disturbances some improvements in conditions were made, but the leaders of the "riots" were usually always deported to China.

It is clear, as the District Court holds, that the territorial statute places it within the power of the opponents to a meeting, or police who do not approve of the purpose of a meeting, to interfere with the right of free assembly. It substitutes suppression of the right of peaceable assembly for the duty to preserve order, and places the burden on citizens to avoid disorder, or to avoid meetings at which disorder by others may occur. Our forefathers, it has been said, did not exalt order at the cost of liberty.

Buckle, in describing this vice in the English statute condemned by the court, says:

> It was also enacted that, even after these precautions had been taken, any single justice might compel the meeting to disperse, if, in his opinion, the language

[11] See Appendix III.

> held by the speakers was calculated to bring the sovereign or the government into contempt; while, at the same time, he was authorized to arrest those whom he considered to be the offenders. The power of dissolving a public meeting, and of seizing its leaders, was thus conferred upon a common magistrate, and conferred too without the slightest provision against its abuse.

The 1947 indictment of Kaholokula and 74 others in the Paia incident, carefully drawn to the Territorial Supreme Court's specifications, after the elephantine words of the statute, charges that the 75 prevented five named persons from crossing the street and proceeding to the place of their employment, thereby endangering their life and liberty and impoverishing them. This appellants deemed a violation within the scope of the statute and sufficient to justify completely the making of a charge under the statute.

Such a statute surely must stand condemned under the doctrine of *Thornhill v. Alabama,* 310 U.S. 88, 96:

> The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior state decisions. In these circumstances, there is no occasion to go behind the face of the statute or of the complaint. Conviction upon a charge not made would be a sheer denial of due process. . . .
>
> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. A like threat is inherent in a penal statute . . . which does not aim specifically at evils within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. *The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their dis-*

> *pleasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.* (Italics supplied.)

Appellants cite *Cole v. Arkansas,* 338 U.S. 345, as authority for upholding the statute. That the appellant Attorney General does not believe the scope of the two acts is the same is apparent from the fact that he sponsored and secured the passage not only of a new riot statute, but also of a statute almost identical with the Arkansas statute upheld by the court as applied in the particular facts before the court.

Professor Chaffee in his excellent, thought-provoking book *Free Speech in the United States* condemns as intrusions on free speech the use of unlawful assembly and riot statutes and conspiracy statutes, and shows that the ordinary criminal laws have proved adequate to cope with abuses of freedom of speech and assembly.

In Appendix III he lists state and territorial statutes affecting freedom of speech. An examination of that appendix shows that the territorial statute carried the most severe penalty existing in any state, bar none. For those states which have unlawful assembly and riot statutes, the average penalty appears to be not over three to six months.

Appellees believe it is clear from the foregoing discussion that the statute provides no ascertainable standard of conduct and therefore is void under the due process clauses of the Fifth and Fourteenth Amendments. As the Court said in *Lanzetta v. New Jersey,* 306 U.S. 451:

> If on its face the challenged regulation is repugnant to due process clause, specification of the details of the offense intended to be charged would not serve to validate it. It is the statute and not the accusation under it, that prescribes the rules to govern conduct and warns against transgression. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.

Obviously, what the statute prescribes would have to be determined by a court after the offense was committed. About all the poor citizen can do is to determine whether he is brave enough to sally forth to any meeting since without any overt act—albeit some violent thoughts—he may be guilty of a felony.

Appellants themselves sum up well the only manner in which the hapless citizen can know whether he has violated the law if he believes the risk of attending an assembly of sufficient importance:

1. if he is charged after the assembly;
2. what the charge says;
3. the testimony;
4. what instructions are given to the jury;
5. what the Supreme Court says on review;
6. what federal courts say after that. (B., p. 69)

The statute is so definite

1. that appellants Crockett and Bevins were unable to draw a sufficient charge under it;
2. Judge Wirtz thought they had;
3. three Supreme Court justices thought they had not, but thought the statute was constitutional;
4. three federad judges disagreed with the Territorial Supreme Court;
5. twenty members of the House of Representatives and fifteen members of the Senate thought it was good enough to prosecute the appellees under, constitutional or not;
6. ten members of the House disagreed.

B. The Statute is Void on Its Face and as Enlarged by the Interpretation Placed on It by the Territorial Supreme Court.

Appellants seem to believe that the scope of the statute was narrowed by the Supreme Court and its vagueness cured. The contrary is true. The scope of the statute was broadened. The statute, as authoritatively construed by the Supreme Court, was

a. either repealed and the common law misdemeanor of riot substituted except for the 20-year felony provisions, or

b. was broadened so that it could become a positive booby-trap for the citizen since attendance at an assembly at which violence occurred might subject him to the penalty, if any act of his or facial expression could be construed as "countenancing" or "concurring in the intent" of those who committed the violence.

If under the statute as construed, the common law misdemeanor of riot was made a 20-year felony, then it imposed a cruel and unusual punishment, being in excess of the penalty at common law. *Weems v. United States,* 217 U.S. 349. The amended penalty would be bad by the same tests.

Local police, as in the Paia incident, may take their cameras and their paper and pencils, and stand by as observers, or read some other statute for the edification of the assembly—such as loitering, or perhaps trespass.

Or the police may, if they desire, order the assembly to disperse, and if the citizen does not agree with him, he can always test the matter by becoming a defendant in a criminal trial.

If it be construed that the statute has been limited, by construction, it must surely fall within the doctrine of *United States v. Reese,* 92 U. S. 214, 222, where it is said:

> We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is uncon-

stitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

C. The District Court Was Not Bound by the Construction Placed on the Act by the Supreme Court of the Territory.

The rule of deference has no application here because he United States Supreme Court has specifically condemned a statute of the exact type of this statute. This is not a question of local law, but a question involving protection of a right guaranteed by the federal constitution.

Federal courts are not bound by the construction placed on a statute where the question is a question of conflict with the federal Constitution. *Yick Wo v. Hopkins,* 118 U.S.

356. See also *Home Telephone Co. v. Los Angeles,* 227 U.S. 278.

In *United States v. Fullard-Leo,* 331 U.S. 256, the Supreme Court, after discussing the "doctrine of deference" pointed out that where the court is "dealing . . . with a problem of federal law . . . the federal courts construe the law for themselves." 331 U.S. 256, 269.

The rule of deference, if it be considered applicable here, is not controlling where the local decision is manifestly erroneous. *Treat v. Grand Canyon R. Co.,* 222 U.S. 448.

The rule of deference, as stated in *Waialua Agricultural Company v. Christian,* 305 U.S. 91, is that in so far as decisions of the Supreme Court of Hawaii *are in conformity with the Constitution* and applicable statutes of the United States and *are not manifestly erroneous* in their statements or application of governing principles, they are to be accepted as stating the law of the Territory.

The decision of the Supreme Court of Hawaii is both in conflict with the Constitution and manifestly erroneous.

The doctrine of *res adjudicata* has no application.

The case of *Territory v. Kaholokula* before the Supreme Court of the Territory of Hawaii was an interlocutory appeal on a question of law. As a result of the appeal, the criminal proceeding terminated in 12,301 in favor of the appellees because the decision required the discharge of appellees because of the defective indictment.

The suit in the federal court is not an attempt to set aside a judgment. There can be no final, appealable judgment in an interlocutory appeal.

Appellees sued to redress a deprivation of federal rights under a statute of Congress. The cases cited, being bills to set aside a judgment, are not apposite.

If appellants' theory were correct, an interlocutory appeal would deprive defendants in criminal cases from asserting the unconstitutionality of criminal statutes in all interlocutory appeals, if the ruling upheld the constitutionality of

the statute, and would deprive such defendants of due process of law.

III. THE CONSPIRACY STATUTE IS VOID ON ITS FACE.

The District Court held the conspiracy act void on its face (R. 461-467). This statute also is a product of the 1850 penal code. It has been consistently and persistently used against workers in every labor dispute since its adoption. Indeed, early strikes were referred to by the newspapers and the courts as "Higher Wage Conspiracies." See Memorandum on Labor and the Law, Appendix I, pp. 13, 15.

Appellants concede that the statute is void in part, but they contend that the court should not have stricken the statute down in toto, but should have separated the void from what they contend is the valid part.

They concede that the indictment against appellees at 12,301 is based on both the void and valid parts. The indictment charges that appellees conspired to beat and bruise the five named persons and to injure them by impoverishing them. According to appellants' witness, Mr. Freitas, no assault and batteries occurred. The 1946 indictment charged merely assaults and shoving and pushing, but not directed against the five named men. (R. 12,301, 32-34)

They have also sponsored and procured the passage of a new statute, reserving the right to proceed against appellees under the old.

The Supreme Court of the Territory, in *Territory v. Soga,* 20 Haw. 71, upheld a conviction of third degree conspiracy against four of the strike leaders. Each was sentenced to ten months imprisonment, $300 fine, and one-fourth of the costs.

Soga was a newspaper editor, and so was Negoro. The means used in the conspiracy were newspaper articles agitating for higher wages.

The charge against the defendants was concerting together:

> to do what plainly and directly tended to incite and occasion offense and to do what was obviously and directly injurious to another

by conspiring to prevent certain corporations owning sugar plantations in the County of Honolulu from carrying on their business and operating their plantations, and thereby impoverishing them by preventing them from carrying on their trade or business. The means charged were threats of violence directed against the corporations and all Japanese in the City and County who did not join with the Higher Wage Association.

The evidence in support of the threats of violence were articles appearing in a Japanese newspaper, the *Nippu Jiji*, in support of the Association which urged "sticking together" to secure higher wages, "whatever the consequences", and other implied threats, which the conspirators did not denounce; letters received by leaders from members of the Association counseling force, which letters were procured from a safe stolen from one of the conspirators with the assistance of the police; a draft of a play attacking an opponent of the strike—likewise found in the stolen safe; and speeches made by the conspirators "intended to stir up the laborers."

The Supreme Court's opinion is quite remarkable.

Defendants insisted that they were not responsible for the articles; that they constantly protested against any unlawful acts. In masterly prose, the court denied the contention:

> This contention, however, cannot be sustained. Under all the circumstances which could have been found by the jury it was the duty of the defendants who deprecated the Jiji articles or did not wish to identify themselves with their publication to say so, and the inference could properly be made that although all of them may not be criminally liable for the writing and publishing of the articles they adopted and used them as part of

> their "campaign;" and that they did this by mutual agreement, whether expressed or implied, is immaterial. Their urging that there be no violence or breach of the peace or anything unlawful done to incur the penalty of the law may or may not have been sincere. When Mark Anthony said to his audience, "Let me not stir you up to mutiny and rage," that was precisely what he meant to do and did do. The fact is that those who "sow the wind must reap the whirlwind," no matter how fervently they may have tried to avoid it. Urging or doing unlawful things is not condoned by urging that they be done lawfully.

It is of interest to note that the Territorial Supreme Court apparently did not consider the Fourth Amendment applicable in the Territory.

It is obvious that the conspiracy statute of the Territory is capable of being interpreted and is being interpreted by the appellants in exactly the same way in which the unlawful assembly and riot statute is being construed—to convert any picket line or concerted activity in a labor dispute into criminal activity for all so engaged if any single act of any individual or individuals makes it possible to do so. The common intent to picket is construed as being sufficient to give a common intent, a concurrence in intent or a combining together, sufficient to make all present, if any infraction of any law occurs, guilty of unlawful assembly and riot and conspiracy.

A mere reading of the conspiracy statute of the Territory shows that is is unconstitutional on its face because it provides no standard of conduct. As here applied, and as applied in *Territory v. Soga,* it is clear that it is also a threat to freedom of assembly and speech.

Section 1 of the statute (11120) defines a conspiracy as a malicious or fraudulent combination or mutual undertaking, or concerting together of two or more . . . to do what plainly and directly tends to excite or occasion offense, or what is obviously and *directly* wrongfully injurious to an-

other. The second paragraph of this section clarifies this by explaining that it is a conspiracy "to prevent another, by *indirect and sinister* means, from exercising his trade, and to impoverish him." The only standard laid down by the statute is a gastronomic test of the prosecuting officers in the first instance and the jurors thereafter.

The statute clearly purports to embrace more than criminal acts; it attempts to embrace moral judgments as well. It does not require a wilful doing of the acts charged as a conspiracy or that they be legally wrong.

In *Screws v. United States,* 325 U.S. 91, the Supreme Court rejected a contention that the section of the criminal code making it a federal crime to deprive another of rights under color of law was unconstitutional only because it required a wilful doing of the acts. But here there is a complete lack of any requirement of such criminal purpose or intent, and the conspiracy statute is clearly void within the exact holding of the *Screws* case.

In *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, an act of Congress was struck down because its enforcement would have been "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." The act declared criminal the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

The conspiracy statute contains no definition or standard for determining what is meant by "or to do what plainly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another." It does not refer to any source where these questions can be determined. The legislature did not define what it desired to punish, but referred the citizen to his own conscience and to a law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice

of Caligula who "published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it."

Ernest Freund, in his criticism of the Debs case, wrote:

> So long as we apply the notoriously loose common law doctrines of conspiracy and incitement to offenses of a political character, we are adrift on a sea of doubt and conjecture. To know what you may do and what you may not do, and how far you may go in criticism, is the first condition of political liberty; to be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift.

There can be no doubt that the Territorial conspiracy statute readily lends itself to harsh and discriminatory treatment by local prosecuting officers, including appellants, against particular groups deemed to warrant their displeasure, and that labor in the Territory and the appellees have been the victims of this harsh and discriminatory treatment.

The District Court was correct in refusing to attempt to rewrite the law.

The statute contains no severability clause, and had to be stricken down as a whole. See *United States v. Reese,* 92 U.S. 214, supra, p. 66.

On its face and as construed by the Supreme Court of Hawaii, it becomes infirm in all its parts.

Winters v. New York, 333 U.S. 507.

Terminiello v. Chicago, 337 U.S. 1.

Strangely, appellants did not see fit to cite the leading Hawaiian case on the subject, although they insist in respect to the unlawful assembly act that the Court is bound by the Supreme Court decision. It should be noted that the private law firm of Kinney, Ballou, Prosser & Anderson "assisted" the prosecution in that case.

IV. THE DISTRICT COURT HAD JURISDICTION OF THE GRAND JURY ISSUE, AND ITS FINDING THAT THE GRAND JURY WAS ILLEGALLY CONSTITUTED IS SUPPORTED BY THE EVIDENCE.

The District Court held that it had the power to hear and determine appellees' claim that they had been denied a fair and representative grand jury composed in accordance with constitutional standards and territorial law, and that the 1947 Maui County Grand Jury was selected in a manner which deprived plaintiff of federal and constitutional rights. (R. 486-512)

It is appellees' contention that the method of selection and composition of the grand jury pursued by the appellants, in the language of the *Screws* case, "flies in the teeth of the decision of the Supreme Court" relating to the proper selection and composition of juries, and that the judge who heard the challenge was so biased and prejudiced, as is manifested by the transcript of the hearing filed in these cases, that the appellees were denied due process of law.

In *Lane v. Wilson,* 307 U.S. 268, the right to sue of a person claiming deprivation of federal rights was upheld under Section 43 of Title 8 without resort to state courts. Justice Frankfurter upheld the right to sue under Section 43 for deprivation or inequality of treatment under color of law.

The appellees seek declaratory relief as redress for their deprivation of federal rights to a constitutionally selected grand jury.

The appellees here ask the Court to do no more than was done by the court in *Lane v. Wilson.*

Appellees' Bill of Particulars (R. 327) enumerates some of the specifications of the lack of due process in the hearing before Judge Cristy and of their deprivation of constitutional rights in respect to the grand jury by appellants under color of law.

The heart and substance of the appellees' claim for relief in respect to the grand jury is that by uncontradicted evi-

dence, they brought themselves directly within well established and well defined rules laid down by the Supreme Court of the United States for the selection of grand juries, and, despite this uncontradicted testimony, that Judge Cristy, in defiance of, and in the teeth of, Supreme Court decisions, upheld the method of selection and composition of the grand jury.

It appeared before Judge Cristy, and the appellants here concede, that no person of Philippine nationality has ever been selected on the grand jury list or summoned as a grand juror in Maui County up to and including 1947. It is conceded that there are qualified Filipinos.

Appellees showed before the circuit court that Patrick Ortello, who stated that he was of Filipino parentage, who went through the 8th grade in Hana School, who was employed by the Kahului Railroad Company, was marked "disqualified" by the Jury Commissioners. None of them was able to state any reason for disqualifying him.

Appellees showed, and the jury commissioners testified, that returned questionnaires of haoles and persons of other races unknown to the jury commissioners, showing less education, etc., were marked qualified and such persons were actually selected for jury service.

Appellees showed that at least seven or eight other questionnaires of Filipino citizens were marked questionable, although according to the returned questionnaires, these individuals had qualifications equal to or greater than persons actually selected for jury service.

Judge Cristy advised counsel for appellees that "questionable" meant "subject to further investigation." None of the jury commissioners up to that point had so testified. As a matter of fact, the jury commissioners testified that they had no funds for summoning prospective jurors, and that the only way a person could be further investigated was by one of the jury commissioners making private inquiries.

The only explanation offered about the absence of Fili-

pinos, although all jury commissioners admitted there were qualified Filipinos—was by Commissioner Pombo who testified that "they had people who were better."

The showing of the complete exclusion of Filipinos from grand jury service in Maui County—although Filipinos constitute the second largest racial group in the county—for a period of at least 30 years, coupled with the unexplained marking of "questionable" and "not qualified" on returned questionnaires by Filipinos not personally known to any of the jury commissioners, certainly meets the tests of the prima facie case of ingenious or ingenuous exclusion on account of race laid down by the Supreme Court in a long line of decisions from *Strauder v. West Virginia,* 100 U.S. 303, to the recent *Patton* case.

As a matter of fact, the *Patton* case is on all fours with this case. There the judge refused to consider, as did Judge Cristy, that not only were Negroes excluded from the particular venire, but that no Negro had been selected for jury lists for a period of 30 years. Representatives of the State of Alabama made the same arguments that appellants make about the low percentage of qualified Negroes, compared with white persons, but the court brushed such reasoning aside, saying:

> But whatever the precise number of qualified colored electors in the country, there were some; and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read or write, or to meet any other or all of the statutory tests, we do not doubt that the state could have proved it. We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by petitioner upon the uncontradicted showing that for thirty years or more no negro had served as a juror in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a

large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.

The proof adduced by appellees that from the standpoint of race, the 1947 grand jury is not a cross-section of the population of Maui County, and therefore violates clearly enunciated principles laid down by the United States Supreme Court, is summarized in tabular form in a chart submitted to the court during oral argument. This summary is based upon the United States census classification of race. It shows:

Percentage Comparison, Race of Population of Maui County[12] and of Grand Jury List, 1947, Maui County

NATIONALITY		Percentage of Population of Maui County	Percentage of 1947 Grand Jury Panel
Japanese	24,183	43.2%	14%
Filipino	10,509	18.8%	0%
Part Hawaiian	7,915	14.1%	24%
Caucasian	6,989	12.5%	54%
Hawaiian	2,946	5.3%	0%
Chinese	1,513	2.7%	8%
Other Races (Korean, Puerto Rican)	1,925	3.4%	0%

The record shows that the appellees offered to prove before Judge Cristy, but were not permitted to prove, that if selected at random from qualified persons in order to secure a cross-section, a grand jury of this racial composition would not occur in Maui County more than once in ten million times.

Appellees adduced proof showing that in the Territory of Hawaii, different mores and attitudes exist than in a typical

[12] Census classification of Race of Population of Maui County. 1940 Population—55,980. Dept. of Health, Bureau of Health (Vital) Statistics, T. H., show little change in racial characteristics, 1940 to 1946. Population, estimated as of July 1, 1946—55,904.

mainland community, and that an analysis of the racial composition of the 1947 grand jury according to census classifications does not reflect the full extent to which the method of selection and composition employed by the jury commissioners fails to result in the selection of a cross-section of the community, or of those qualified for jury service. Thus, in island mores, it was shown that persons of Portuguese national background are not considered Caucasians. It was shown that there is a general division of the population into two classes: haole (white) and non-haole, which includes all other races. Portuguese are classified either as non-haole or in a separate class by themselves. It was further shown that the term "haole" has a generally accepted economic as well as racial connotation and means "a white man with a good job."

One of the jury commissioners of Portuguese extraction very clearly establishes this. After testifying that he considered himself white, but that the "haoles" did not so consider him (Transcript before Judge Cristy, p. 267), he finally testified on cross-examination:

> No, I don't consider a Portuguese a white man. They consider us as niggers here. We are not classed as white men. They don't even class us as Caucasians themselves and I told you that yesterday, and I would like to have that included—that Portuguese are not called Caucasian. (R. 875)

When asked why he picked haoles, Commissioner Pombo testified as follows:

> Witness: No, I pick them because I want to give them something to do—if they want a chance to run the country—
>
> The Court: Did you pick them because of their fairness?
>
> Witness: Because they are fair. They are in court—they have to be fair. There is another jury—in case it don't go right on the Grand Jury, the trial jury is waiting for them.

Mr. Resner: What did you mean a moment ago—you said they wanted a chance to run the country?

A. Well, they do run the country.

Q. How do you mean that?

A. The majority—lots of these—the Baldwins—they own the place. (R. 830-831)

An analysis of the composition of the 1947 grand jury based on accepted Island classifications shows:

Percentage Comparison of "Nationality" of Population of Maui County, 1940, and of Persons on the 1947 Grand Jury Panel, Maui County[13] "Nationalities" Roughly Ranked as to Socio-Economic Status

NATIONALITY	Percentage of Population	Percentage on Grand Jury
Haole	3.6%	42.0%
Portuguese	8.8%	12.0%
Caucasian-Hawaiian	7.4%	20.0%
Other Part-Hawaiian	6.8%	4.0%
Chinese	2.7%	8.0%
Japanese	43.2%	14.0%
Korean	1.4%	0
Hawaiian	5.3%	0
Puerto Rican	1.9%	0
Filipino	18.8%	0

Clearly, the 1947 grand jury does not represent a cross-section of the community of Maui County. Appellees also showed that the same high percentage of haoles in the Maui County Grand Jury existed for the preceding five years. (Plaintiffs' Exhibit No. 26)

Appellees contended and proved before Judge Cristy that the 1947 grand jury was not an accident, but a fixed pattern of jury selection in Maui County. No evidence was offered to rebut appellees' proof.

[13] Number of Haoles ("Other Caucasians"), Portuguese (including Spaniards), Caucasian-Hawaiians and other Part-Hawaiians, Koreans and Puerto Ricans obtained by carrying forward the 1930 proportions of these categories.

Not only did appellees prove that the grand juries for 1947 and the preceding five years are not a cross-section of Maui County racially, but that they are even less representative economically.

Judge Cristy accused the appellees of making up, out of whole cloth, class antagonisms and prejudices. That class prejudices do exist has been recognized in jury selection since the time of Blackstone, and the Supreme Court takes judicial notice of it.

Apparently, Judge Cristy and the jury commissioners, based upon their actual selection and their testimony about the qualifications necessary for a "good" juror, agree with Sir James Stephens who, in his *History of Criminal Law*, which appeared in 1882, said:

> I cannot say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashions of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties. . . I think that the habit of flattering and encouraging the poor, and asserting they are just as serviceable and capable of performing judicial and political functions as those who from their infancy have had the advantages of leisure, education, and wealth, has led to views as to the persons qualified to be jurors which may be very mischievous. . . In short, I think a good judge and a good special jury form as strong a tribunal as can be had, but I think a judge without a jury would be a stronger tribunal than an *average common jury*. (Lloyd Paul Stryker, For the Defense, p. 211)

Appellees' analysis of the 1947 grand jury based generally upon United States census classifications of occupation shows:

Percentage Comparison, Socio-Economic Classes, Gainfully Employed Persons of Maui County, 1940, and Grand Jury List, Maui County, 1947[14]

SOCIO-ECONOMIC CLASSES	Percentage of Population	Percentage of Panel
Proprietors and Managers (Important firms and/or large branches)	0.6%	24.0%
Other Proprietors, Managers, officials and foremen	4.9%	40.0%
Professional and Semi-professional	3.2%	8.0%
Farm Foremen	2.5%	0
Farmers	2.5%	4.0%
Clerical, sales, etc.	6.4%	12.0%
Craftsmen and Operatives	18.1%	6.0%
Laborers, Non-Farm	9.9%	2.0%
Farm Laborers	47.1%	0
Service Workers	4.7%	0
Occupation Not Specified	0.3%	4.0%

That this economic composition was not accidental appears from Commissioner Pombo's testimony:

> Q. . . . What standard did you use?
>
> A. Well, we picked men—majority of them with better education. They are in business in the community.
>
> Q. Yes. Was it your feeling that a man in business would be better qualified than a man out of business?
>
> A. He has got a better head on him.
>
> Q. Is that the conclusion you arrived at?
>
> A. If I can pick a business man, got a business of his own, and good moral character, I would just as soon pick him than pick some juror I don't know anything about other than what you see on paper. (R. 855-856)

Fay v. New York, 332 U.S. 261, holds that a state may, consistent with the due process of the Fourteenth Amendment, try one charged with a crime by a so-called special or

[14] Adapted from Table 3, with certain classes combined and/or divided; Grand Jury data corrected.

blue-ribbon jury. The court, however, carefully distinguished between state and federal juries and the decisions touching each.

The Territory of Hawaii exercises only power delegated by Congress, and Congress cannot, without an amendment to the Constitution, deny the right of trial by jury or indictment by a grand jury.

That this constitutional guaranty means a grand jury is a cross-section of the community is not now open to question in the light of Supreme Court decisions on jury standards in federal courts.

It must be taken as settled then, that the territorial legislature could not adopt a blue-ribbon jury system. Yet, a comparison of the occupational classification of the blue-ribbon jury in the *Fay* case and the 1947 Grand Jury of Maui County shows that the *Fay* jury was less packed than the 1947 grand jury with the economically privileged, as is shown by the following table:

	Percentage of total experienced labor forces		Percentage of representation	
	Manhattan	Maui County	"blue ribbon" panel	Maui County
Professional and semi-professional	12.1	3.2	18.8	8
Proprietors, managers and officials	9.3	5.6	43	64
Clerical, sales and kindred workers	21.3	6.4	38	12
Craftsmen, foremen and kindred workers	7.7	20.16	0.2	6
Operatives and kindred workers	17		0	
Service workers	27.6	4.7	0	0
Laborers	4.9	57	0	2
Farmers	0.1	2.5	0	4
Not specified		.3		4

In the blue-ribbon jury, 99.8% were picked from groups representing 42.7% of Manhattan's population. In Maui County Grand Jury, 84% of the jury were picked from groups representing 15% of the population.

Even in the majority opinion in the *Fay* case, the court recognized that the exclusion of workers in a case growing out of a labor dispute might present a different problem. Here, unlike in the *Fay* case, the plaintiffs are farm laborers who are excluded totally from the jury.

The appellees' evidence also shows that an overwhelming number of the jurors on the 1947 panel were personally known to the jury commissioners. Thus, all but 9 of the 50 were known to the jury commissioner, Chatterton; all but 10 of the 50 were known to the jury commissioner Pombo; and 30 of the 50 were known to the jury commissioner, Wirtz.

The Supreme Court has condemned in *Smith v. Texas,* 311 U.S. 128, the selection of personal acquaintances by jury commissioners on the ground that it makes suspect the securing of a true cross-section of the community.

Appellees' evidence clearly and unequivocally falls within the scope of decisions of the United States Supreme Court condemning identical practices in the selection of juries as shown here, and holding evidence of the same character sufficient to show that the jury in question was not a cross section.

This evidence was before Judge Cristy and the decisions were called to his attention in the course of the hearing on the challenge. It is, therefore, submitted, that Judge Cristy's action in overruling the challenge "flies in the teeth" of express holdings of the Supreme Court, and that appellees' evidence supports the findings of the District Court.

In 12,301, where the 1947 grand jury has already indicted appellees, the question of the legality of the selection and composition of the grand jury is not moot. Nor is the contention valid that the appellees in the Kaholokula case vol-

untarily adopted the ruling of the challenge in the Barbosa case. They had no choice.

The order of the Supreme Court of the Territory designating Judge Cristy as substitute judge, ordered and authorized him to hear and determine the question of any challenges to the grand jury of 1947, whether in the Barbosa case or otherwise, and Judge Cristy, pursuant to this authority, specifically ruled that the method of selection and composition of the Maui grand jury was in accordance with law and that the Barbosa case *and all other cases* could be presented to said grand jury.

There is no remedy by appeal from Judge Cristy's ruling, and even if there were, it would subject appellees to a further deprivation of rights.

It is clearly the law that if the grand jury is, as alleged by appellees, unconstitutionally composed, all proceedings taken thereafter are annulled. Thus, in *Patton v. Mississippi,* decided December 8, 1947, the Supreme Court reversed a conviction and directed that the indictment be quashed because of the improper selection of the grand jury.

Under our Constitution, the jury is not to be made representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution representative of all classes of people.

Thus, the Supreme Court in *Strauder v. West Virgina,* 100 U.S. 303, stated:

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'the right of trial by jury or the country is a trial by the peers of every Englishman and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statu-

> tory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particularly classes in the community, which sway the judgment of jurors, and which therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

The evidence of weighting of the grand jury in favor of business clearly is in direct violation of this decision.

All of the appellees belong to the excluded class, and their alleged offense arose out of a labor dispute.

The decisions of the Supreme Court of the United States have made it clear that a jury which excludes in whole or in part representatives of the employee class is not a cross-section of the community. The court has specifically condemned any tendency which would cause a jury to become representative of the economically and socially privileged, and has struck down a practice of jury commissioners which causes this result even though the particular jury in question in fact had representatives of the working class.

Thus, in *Thiel v. Southern Pacific Company,* 328 U.S. 217, the court said:

> Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do. . . .
> To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial from a panel properly and fairly chosen.

Even the dissenting justice in the *Thiel* case recognized and stated specifically the method of selection must not be tainted by property prejudice:

> The process of justice must of course not be tainted by property prejudice any more than by race or religious prejudice. . . . .
> If workmen were systematically not drawn for the jury, the practice would be indefensible. . . .

In *Fay v. New York,* 332 U.S. 261, the Supreme Court said that even though states could abolish the traditional system, they could not exclude in whole or in part representatives of certain classes in certain kinds of cases.

The court said:

> There may be special cases where exclusion of laborers would indicate that those sitting were prejudiced against labor defendants as where a labor leader is on trial on charges growing out of a labor dispute. The situation would be similar to that of a Negro who confronts a jury on which no Negro is allowed to sit. He might very well say that a community which discriminates against all Negroes discriminates against him.

If Benjamin Fairless and the directors and managers of all large business concerns in a steel town were assembled as a grand jury, during the course of a strike in the steel industry, to consider alleged charges of violence by striking steel workers, it may be assumed that such a case would fall within the category of special cases to which the court referred.

The United States Steel Corporation, giant as it is in the economic structure of the United States, is small in comparison with the Baldwin interests in the community of Maui County, which includes the Islands of Maui, Lanai and Molokai.

Alexander & Baldwin, Ltd., one of the Five Factors of Hawaii, and the Baldwin Family had, at the time of the grand jury challenge, controlling interest in two of the four

sugar companies in the county—Hawaiian Commercial & Sugar Company and Maui Agricultural Company, now combined, which in turn owned the East Maui Irrigation Co., two of the four pineapple companies, Baldwin Packers and Maui Pineapple Co., two of the largest ranches, Haleakala Ranch and Ulupalakua Ranch, the Maui Electric Company and the Kahului Railroad. (R. 578-583)

At the last time any ascertainable estimate was available, in approximately 1933, $15,000,000 out of $24,000,000 of the sugar assets of Maui County, as evaluated at that time, were in the control of the Baldwin Family.

The industries of Maui County are sugar, pineapple, with ranching a poor third. In each field, Alexander & Baldwin or the Baldwin family had the dominating interest in the county.

Both the sugar and pineapple strikes were industry-wide and therefore affected the Baldwin interests directly.

To paint the picture concretely, and not abstractly by percentages, the 127 sugar and pineapple workers involved in this case faced a grand jury composed of 17 men—8 of whom were management representatives of the Baldwin interests.

They are: Edwin H. Baldwin, Manager, Ulupalakua Ranch; Richard H. Baldwin, Manager, Haleakala Ranch; Robert P. Bruce, Manager, East Maui Irrigation Company; John Plunkett, Supervisor, East Maui Irrigation Co.; E. Stanley Elmore, Board of Directors, Maui Electric Company, and President and Manager of Valley Island Motors; Herbert Petersen, Manager, Plantation Store, Hawaiian Commercial & Sugar Company; Jack Costa, Chief Electrician, Hawaiian Commercial & Sugar Company; Edward S. Bowmer, Cashier and Assistant Bookkeeper, Baldwin Packers.

Jury Commissioner Pombo's statement that the Baldwins were put on the jury because they owned the country and wanted to run the country, seems substantiated, to the extent at least that they were put on the jury.

The remaining 9 jurors were: Kenneth Auld, Section Superintendent of California Packing Co., Molokai; Paul R. Reinhart, Assistant Plantation Manager, Libby, McNeill & Libby, both pineapple companies involved in the strike; Joseph H. Frank, Manager, Bank of Hawaii; Allen Ezell, Branch Manager, Hawaiian Airlines; Henry S. Fong, contractor and manager; Anthony Tam, farmer; Wai Ken Tom, Office Manager, Mutual Telephone Company; and Walter Holt, Forester, of the Board of Forestry.

Racially, the composition of the grand jury was as follows:

	Percentage of Population	No.	Percentage of Panel
Haole	3.6	11	64.7
Caucasian-Hawaiian	7.4	3	17.65
Chinese	2.7	3	17.65
Total	13.7		100.

In other words, racially, groups representing 13.7% of the population had 100% representation of the jury, leaving unrepresented 86.3% of the population to which racial groups appellees belonged.

Economically, the composition of the grand jury was as follows:

	Percentage of Population	Percentage of Grand Jury
Proprietors and managers of important firms or large branches	.6	41
Other proprietors, managers, officials and foremen	4.9	30
Professional and semi-professional	3.2	11
Farmers	2.5	5.9
Craftsmen and operatives	18.1	5.9
Not specified	.3	5.9

There is only one juror who even approaches what might be considered a laborer, and he is the Chief Electrician at Hawaiian Commercial & Sugar Company. Classing him as a representative of the laboring class, economic groups rep-

resenting 11.5% of the community had 94% representation on the jury.

Jury Commissioner Pombo's statement that the jury commissioners thought business men were better jurors seems to have been applied by all the commissioners as a criterion.

It is to be remembered that in the special blue-ribbon jury in the *Fay* case, which cannot constitutionally exist in Hawaii, groups representing 42.7% of the population had 99% representation on the jury.

When it is considered that all these facts were presented to the territorial court and overruled; when it is considered that of the 17 grand jurors, 10 were important officials of companies seriously affected by both the sugar and pineapple strike, it seems that appellees have made out a case of a denial of a fair and impartial grand jury—well within the exact quantum of proof the United States Supreme Court has said shows discrimination based on race and economic classes.

The Bar Association of Hawaii and appellants urge on this Court that evidence in the record does not support the findings of the District Court.

If it is true that there is no place in our system of government for the exercise of purely arbitrary power, *Yick Wo v. Hopkins,* 118 U.S. 356, surely appellees are entitled to redress for the denial of a fair and impartial grand jury.

And since it is the established practice of the United States Supreme Court:

> to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual State officers from doing what the Fourteenth Amendment forbids the State to do. *Bell v. Hood,* 327 U. S. 678

the Federal District Court must have the power to redress appellees' denial of a fair and impartial grand jury by appellants acting under color of law.

CONCLUSION

The District Court for the District of Hawaii, sitting *en banc* had jurisdiction to hear and determine these two causes, and the exercise of its equitable discretion was proper.

The District Court's findings of facts are supported by the evidence. In all instances of disputed facts the District Court accepted the testimony of the witnesses for appellants. In short the District Court found that taking the facts in the light most favorable to appellants, appellees were entitled to relief from a continued denial of constitutional and federal rights.

The District Court found that since territorial courts have already passed on all questions of law adverse to appellees, there is no possibility of relief from the continued denial of rights short of appeal to this Court.

This indeed is a case which presents even stronger reasons for the refusal of this Court to interfere with the exercise of judicial discretion by the District Court than appeared in *Public Utilities Com. v. United Fuel Gas Co.*, 317 U.S. 456. There the Supreme Court, in refusing to interfere with a three-judge court's decision granting an injunction, said at page 469:

> It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. . . . In these circumstances, we cannot set aside the decree of the

District Court as an improper exercise of its equitable jurisdiction.

The two statutes declared invalid are clearly as the District Court found, void on their face. The method pursued in the selection of the grand jury meets the standard of proof well defined by decisions of the United States Supreme Court.

Past deprivation of rights, and threatened continued deprivation of rights has been clearly shown. The grave irreparable injury to appellees has been established by the evidence and found by the District Court.

This case is many-faceted, legally and factually. Had appellants been able to show that one or more of the facts found by the District Court were erroneous, even that would not be sufficient to entitle appellants to a reversal in this case. The question before this Court is whether under all the facts and circumstances and under the law substantial justice has been done.

Three federal judges who heard the facts unanimously concluded that appellees were entitled to relief if justice were to be done in accordance with the requirements of the Constitution and laws of the United States.

The decree and judgments in both cases should be affirmed.

Dated at Honolulu, T. H., this 25th day of May, 1950.

Respectfully submitted,

BOUSLOG & SYMONDS
HARRIET BOUSLOG

By HARRIET BOUSLOG
Attorneys for Appellees.

APPENDICES

APPENDIX I

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary, Unincorporated Association and Labor Union, et al., *Plaintiffs,* vs. WALTER D. ACKERMAN, JR., Individually and as Attorney General of the Territory of Hawaii, et al., *Defendants.*	Civil No. 828
INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary, Unincorporated Association and Labor Union, et al., *Plaintiffs,* vs. WALTER D. ACKERMAN, JR., Individually and as Attorney General of the Territory of Hawaii, et al., *Defendants.*	Civil No. 836

MEMORANDUM ON HISTORY OF LABOR AND THE LAW IN THE TERRITORY OF HAWAII

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary, Unincorporated Association and Labor Union, et al., *Plaintiffs,* vs. WALTER D. ACKERMAN, JR., Individually and as Attorney General of the Territory of Hawaii, et al., *Defendants.*	**Civil No. 828**
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MEMORANDUM ON HISTORY OF LABOR AND THE LAW IN THE TERRITORY OF HAWAII

During the course of the hearings on these cases, the parties were asked to supply the court with a history of labor cases before territorial courts. Investigation unfortunately disclosed that no such study had ever been undertaken before and that the background and history of labor cases in the criminal courts of the Territory were buried and unreported before District or Police and Circuit Courts. It also appears that in few cases growing out of labor disputes were the accused represented by counsel and hence few ever reached the Supreme Court of the Territory and only one, so far as counsel has

been able to find, ever reached the federal courts on appeal from territorial courts.[1]

It will be recalled that the same obstacle was encountered by Justice Frankfurter[2] in attempting to record the history of the labor injunction and contempt proceedings in both state and federal courts.

The historical background is important in order to place the instant cases in proper setting and in order to understand the suppression of labor rights in the Territory and the role of the courts in the area of economic conflict. Therefore, counsel for plaintiffs have endeavored to piece together from official reports and from contemporary reports in the daily press and from such court decisions as exist a record which will speak for itself, so that the court may draw its own conclusions.

Labor organizations in the Territory of Hawaii made little progress until 1945. That this was due in no small part to a suppression of labor's rights is indicated by government reports. A report of the United States Department of Labor on Hawaii in 1929-1930[3] states:

> Labor organizations in the Hawaiian Islands are few in number, small in membership, and with the exception of the barbers' union, have no agreements with the employers. (Page 117)

A succeeding Labor Department Report in 1939[3a] states:

> The high degree of intercorporate control makes it impossible to mobilize the resources of all large enterprises to restrict the growth of labor unions and to combat strikes in whatever fields

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[1] *Goto v. Lane,* 265 U.S. 393. This was an appeal from a denial of a writ of habeas corpus by the federal district court for Hawaii after the conviction of fifteen leaders of the Hawaiian Higher Wage Consummation Association for conspiracy after the 1920 strike. The Supreme Court did not consider the case on its merits, but held that counsel for workers had waived defects in the indictment, and that since counsel for defense had permitted their time to appeal for writ of error to elapse, so as to lose their opportunity for review, they were not entitled to habeas corpus as a substitute, and the issuance of a writ became discretionary under these circumstances.

[2] See Frankfurter and Greene, "The Labor Injunction." (1930)

[3] Labor Conditions in the Territory of Hawaii, 1929-1930, United States Department of Labor, Bulletin No. 534 of the Bureau of Labor Statistics.

[3a] Labor in the Territory of Hawaii, 1939, 76th Congress 3d Session, House Document No. 848, Bulletin No. 687, United States Department of Labor, Bureau of Labor Statistics.

of industry they may occur. There is a tendency on the part o management to assume that unionism is synonymous with dan gerous radicalism, possibly because the labor movement i Hawaii has not always been wisely led. The result of this atti tude is the feeling that labor unionism is a common menace to al Hawaiian enterprise, and that the duty of combating its develop ment is a common problem of the management of all industrie whenever labor trouble occurs. Thus, although management ha done much for labor in Hawaii, it has used every influence a its command to restrict labor organization.

* * * * * * * * * * *

The position of the individual plantation worker is especiall vulnerable. The house in which he lives, the store from whic he buys, the fields in which he finds his recreation, the hospita in which he is treated, are all owned by plantation managemen which in turn has its policies controlled from the offices of th factors in Honolulu.

Whether it is justified or not, there is a prevalent feelin among the majority of Hawaiian workers that a bad record wit any important concern in the Territory makes it difficult to obtai employment in any other concern, and that to be associated wit labor union activities is certain to weaken their employmen opportunities, if not destroy their economic future (Page 198)

* * * * * * * * * * *

In comparison with the highly integrated character of indus trial management, the organization of labor in the Territory meager.

To understand the development of labor organization i Hawaii, it is necessary to remember that in less than 70 years th population has increased from 56,000 (in 1872) to well ove 400,000 * * * * (Page 199).

The total membership of all unions in the Territory has bee increasing. Accurate figures are not available. Estimates of tota membership by union officials vary from 3,500 to 6,000 mem bers. Even if the larger figure is accepted as accurate, it woul indicate that less than one twenty-fifth of the gainfully employe are unionized (Page 203).

I. CONDITIONS OF LABOR PRIOR TO 1900

A. Contract Labor

Indentured servitude existed in Hawaii for the fifty years precedin the annexation to the United States and the extension of the protec tion of the United States Constitution to the people of Hawai Although this slavery was prohibited by the Organic Act, so stron

were the habits and attitudes of mind characteristic of both servant and master under such a system that conditions for labor changed little until far into the twentieth century.

The Commissioner of Labor on Hawaii in his 1902 Report[4] summarizes the history of the penal labor contract law in the years preceding annexation. (The original act was passed in 1850. Contract labor was abolished June 14, 1900.)

> The seamen's or penal contract act appears with unimportant changes as the master and servant law of the Hawaiian civil code or compilation published in 1859. The essential features were:
>
> (1) Any person not a minor might bind himself or herself out by written contract to serve another in any art, trade, or occupation for a period not to exceed five years.
>
> (2) Any similar contract made in a foreign country, in accordance with the laws of that country, would be held binding in Hawaii, but its term must not exceed ten years.
>
> (3) For willful absence or refusal to work, a contract servant might be apprehended and sentenced by any district or police magistrate to serve his employer not to exceed double the time absent, after the date of the expiration of his contract, but such extra period should not exceed one year. For continued refusal to work, a contract servant might be committed to prison.
>
> (4) A district or police magistrate might terminate a contract if a charge of cruelty or of violation of contract was sustained against an employer.
>
> An amendment in 1860 authorized magistrates to impose not to exceed three months' imprisonment, besides the additional period of service already provided for, upon contract servants deserting a second time. . . (Page 13)
>
> The amendments of 1872 greatly improved the legal status of contract men. Though the courts condemned the practice as illegal, the old ship custom of flogging laborers for disorder or disobedience still obtained on some plantations. It was impossible to secure the conviction of the guilty parties in such cases because the flogging was not done in the presence of witnesses. The first of the amendments mentioned made the complainant—i.e., the laborer—a competent witness in a suit of this character, and provided for his discharge from his contract and for fining or imprisoning the employer if he proved his case. A second amendment rendered a contract by a married woman invalid, and provided that any contract for service made by a woman should be voided by her subsequent marriage. The third amendment provided that when a servant was sentenced by a

[4] Report of the Commission of Labor on Hawaii (1902).

court to make up time lost by desertion, he should be paid fo such time at the rate stipulated in the contract. The fourt amendment, which was evidently intended to prevent peonage prohibited masters from holding a servant to work beyond th expiration of his regular term of service for any debt or advanc made during the period of the contract. The final amendmen provided for special officers who should acknowledge all con tracts for service. Advances were required to be paid the labore in the presence of one of these officers. It was further require that all fees and commissions for securing and contracting labo should be paid by the employer, and should not be deducted i any way from the wages of the laborer as stipulated in th contract.

An amendment was passed in 1876 substituting fines an imprisonment for service beyond the term of the original con tract in case of desertion. (Page 15)

An act was passed in 1882 limiting advances to servant entering upon contracts to $15 if the period of the contract wa for one year, and to $25 if it were for a longer term. An excep tion was made of money advanced to pay the passage of imm grants. (Page 15)

The courts ruled that time lost to an employer through th illness of a servant need not be made up at the expiration of th contract. (Page 16)

The law did not require that the kind of service or the plac where it was to be performed should be definitely specified in contract. (Page 16)

From the Biennial Report of the Attorney General to the Legisla tive Assembly[5] in 1882, we find how attempts to rebel agains indentured servitude were suppressed by the government:

Among the number of arrests herewith furnished there hav been no less than 3,454 for "desertion of service." Take thi into comparison with the number ten years ago, when there wer only 568 arrests for that offence, and you can see the amount o travel and work for this offence alone which is done by th police. This increase is caused solely by the increase in suga plantations throughout the Islands, and these arrests have enor mously increased the expenses of the prisons and lock-ups, a each person is fed from one to three days ere being sentence or discharged. (Page 13)

By 1890, the number of arrests for attempt to evade plantatio

[5] Biennial Report of the Attorney General to the Legislative A sembly of 1882.

slavery had again jumped. The Attorney General in his Report to the Legislature[6] for the biennial period ending March 31, 1890, reports:

> It will be noted that the largest number of arrests made are for deserting contract service amounting as follows:

	Arrests	Convictions
Hawaii	2,473	2,372
Oahu	522	486
Maui	1,078	905
Molokai	12	12
Kauai	1,721	1,612
	5,706	5,387

> or in other words to nearly one-third of the arrests and about three-eighths of the convictions over the whole group. (Page 37)

The Biennial Report of the President of the Board of Immigration[7] in the same year, 1890, gives us a breakdown of Hawaii's plantation labor force in that year:

Total Unskilled Plantation Laborers, 17,895

	Males		Females	
	Contract	Day	Day	Minors
Hawaiians	900	954	19	
Portuguese	463	1867	271	416
Japanese	5694	952	914	
Chinese	303	4214		
South Seas Is.	252	123	58	
Americans		101		
British		80		
Other Natn's		314		
	7612	8605	1262	416

Thus, in the year 1890, when there were 7,612 contract laborers on sugar plantations, there were 5,706 arrests for deserting servitude and 5,387 convictions.

The Attorney General in his 1890 Report[8] concludes that the cost to the government of police work in enforcing these contracts was great:

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[6] Report of the Attorney General to the Legislature for the Biennial Period Ending March 31, 1890.

[7] Biennial Report of the President of the Board of Immigration to the Legislature of 1890 (Page 33).

[8] Report of the Attorney-General to the Legislature for the Biennial Period Ending March 31, 1890, Page 43.

> It will be seen that over one-third of the police work on the other islands is taken up with this matter. Here in Honolulu it is a considerable expense to us as we have to keep four or five men in full pay, as interpreters and policemen, to attend to nothing else who are thus not available for patrol or regular police duty. I am of the opinion that the Government is put to considerable expense for the benefit of the employers of labor; and, were no warrants of arrests allowed to be issued by law for contract laborers, the police force could be considerably reduced. . . .

The Attorney General's above comment was apparently budgetary. There were few protests, except from the indentured servants themselves, about the system. An occasional reference indicates that some churchmen disapproved of the flogging of workers which was a concomitant of the system.[9]

B. Use of Corporal Punishment by Planters' Agents

The record shows that the practice of using physical force against indentured servants persisted. In 1875, Charles T. Gulick, President of the Board of Immigration, upon the importation of a considerable number of Japanese indentured laborers, inserted the following warning in the *Planters' Monthly:*[10]

> It has further been distinctly considered and determined by the Government, that no employer or overseer (*luna*) shall be permitted, under any circumstances (except in self-defense) to strike or lay hands upon any contract laborer who is recognized as a Government ward . . . It is rendered all the more important when considered in the light of the sensitive nature of the

[9] In 1866, the Rev. Elias Bond, writing to the Honolulu agents of the Kahala Plantation concerning the manager stated: "If he returns to Kohala Sugar Company, it must on condition that the people shall be allowed to hold their regular weekly (prayer) meeting. They must be allowed a newspaper, if they wish. Above all, *flogging* is to be *abandoned.* We must try to train *men,* and not brutes. A man flogged for stealing, and rendered sulky by such treatment, undoubtedly set fire to the carpenter shop recently. This style of management *must* be abandoned." (Ethel M. Damon, "Father Bond of Kahala, A Chronicle of Pioneer Life in Hawaii," Page 189.)

[10] "Planters' Monthly," 4:117, communication dated Aug. 10, 1885 by Chas. T. Gulick.

> Japanese race, in particular, which renders any rough-handling of the laborer abortive, if intended to secure obedience.

And again, in 1886, in his Report to the Legislative Assembly, the President of the Bureau of Immigration stated:[11]

> In regard to arrests and seizures, planters had been informed that they had no right to act for themselves, and had been warned against allowing any employee to lay hands upon the Japanese, as a violation of the rule would be deemed by the Government sufficient cause for the removal of any such person.

C. Government Protection of Planters' Labor Contracts

Actually, the planters had little need to act for themselves. The Citizens Guard, predecessor of the National Guard, police officers, the courts in criminal prosecutions, and in orders of deportation rendered the planters able assistance.

The references to the Citizens Guard in the Attorney General's Biennial Reports to the Legislative Assembly in 1882, 1897 and 1899 indicate the useful purpose served by the guard.

Thus in 1882, the Attorney General reports:[12]

> It is highly improbable that in a country where there are so many laborers employed, disturbance of a serious character should not take place, which could be suppressed only by a well drilled, and especially well officered body of men.

Again, in the 1897 Report:[13]

> The Guard is a useful organization and should be encouraged. Riots among our Japanese and Chinese labor are not uncommon occurrences and it is the presence of the Guard that gives assurance of security that otherwise would not prevail.

And again, in 1899:[14]

> The companies of Citizens' Guard in these outer Districts are

[11] Report of the President of the Bureau of Immigration to the Legislative Assembly of 1886, Pages 232, 234.

[12] Biennial Report of the Attorney General to the Legislative Assembly of 1882, Page 7.

[13] Report of the Attorney General (for the biennial period ending December 31, 1897) Pages 41, 42, from report by L. M. Baldwin, Sheriff of Maui.

[14] Report of the Attorney General (for the period ending December 31, 1899) Pages 44, 45, from "Report of the Adjutant of the Citizens' Guard."

> in good working order, and are in a position to be called upon at a moment's notice to check any trouble or uprising that may occur at any time amongst the ever increasing number of Asiatics continually arriving in the Islands to supply needed labor for the many new plantations now in course of development.
>
> *The moral effect upon the Asiatics of having a body of thirty or forty white men well armed and commissioned as Special Police Officers ready at all times, has without doubt been the the means of saving a great deal of trouble.*

Even when investigation revealed just complaints on the part of the laborers, criminal prosecution and deportation followed attempts to protect themselves.

In the 1897 Report of the Bureau of Immigration,[15] Wray Taylor, Secretary of the Board reported:

> On April 21, 1897, I visited Lihue Plantation, Kauai, for the purpose of investigating causes that led up to a riot there, and which resulted in the death of a Chinese contract laborer, and the arrest of fifteen others on a charge of rioting. Mr. Goo Kim, the Chinese Commercial Agent, had previously made a complaint that the Chinese laborers were not treated well at Lihue and requesting an investigation.
>
> I spent two days at Lihue thoroughly enquiring into the matter, and on my return, requested that the head luna, Mr. Zoller, be discharged at once and that Manager Wolters be reprimanded and held to strict account for the better treatment of the laborers in the future. This was done and since then no further complaints have come from Lihue. Fifteen ringleaders in the riot were by order of the Court, returned to China.

The *Planters' Monthly* in September, 1890, reports that Japanese plantation labor upon arrival were registered at the Japanese Consulate and received numbers. The *Planters' Monthly* spoke with satisfaction of the assistance rendered by Japanese Consulate representatives. "He may run away from Kauai and go to Hawaii, but sooner or later the Japanese officials will find out where he is and send him back to his employer."[16]

In October of the same year, the *Planters' Monthly* hailed as a successful experiment the plan of having the Planters' Labor & Supply

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[15] Report of the Bureau of Immigration for the Biennial Period Ending December 31, 1897, Pages 8, 9, by Wray Taylor, Secretary of Board of Immigration.

[16] *Planters' Monthly,* 9:390, September, 1890.

Co. (predecessor of the Hawaiian Sugar Planters' Association) pay the salaries of two special policemen appointed by the Board of Immigration "to seek out and arrest the deserters."[17]

The Report of the President of the Bureau of Immigration to the Legislature of 1892 reports a "riot at Kohala" on August 24, 1891:[18]

> About 200 and more Chinese rioted against planter L. Asen because of illegal deduction of $5.50 from $15.00 monthly wages. No arrests, though there was a real riot and Deputy Sheriff Pulaa was in danger of being killed.
>
> They then all went to Kapaau, met other Chinese there, increasing their number to 300 or more.
>
> . . . . . Another riot commenced and orders were given to natives to arrest the Chinese, and 55 were locked up. They were prosecuted for battery on Government officers. A *nolle prosequi* was entered by Deputy Sheriff Williams and that was the end of it.

That there was no such thing as a legal strike in Hawaii is implied in a Report of the Sheriff of Kauai included in the Attorney General's 1895 Report:[19]

> I would recommend . . . that four new cells be added to the Prison at Lihue. Here there is ordinarily room enough, but when labor strikes occur on the plantations large numbers of men are sometimes sent in at one time, and then the prison is greatly overcrowded.

D. Separation of Race as a Means of Controlling Labor

That the planters found it easier to control disturbances by hiring different races is indicated in a letter from H. F. Glade and F. M. Swanzy, a committee appointed by the Planters' Labor and Supply Company, set forth in the 1894 Report of the President of the Bureau of Immigration:[20]

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[17] *Planters' Monthly,* 9:449, October, 1890.

[18] Report of the President of the Bureau of Immigration to the Legislature of 1892, Pages 74-79.

[19] Report of the Sheriff of Kauai, S. W. Wilcox, dated December 27, 1895, contained in Report of the Attorney General (for the period ending December 31, 1895, Page 75).

[20] Letter from H. F. Glade and F. M. Swanzy, Committee Appointed by P. L. & S. Co., January 9, 1894, Biennial Report of the President of the Bureau of Immigration (1894), Pages 8-12. (The same report, Page 8, reports considerable trouble among Japanese laborers, particularly on Kauai.)

> . . . when the planter is entirely restricted to Japanese for his labor, employing, as some of them do, on one estate, 800 to 1,000 men. . . . . they become a menace, showing a disposition to get exacting and quarrelsome, and if disposed to make a "strike" could produce results very disastrous to the plantation . . . . . .
>
> . . . a single nationality of labor on a plantation is objectionable.

E. Grievances of Contract Labor

Dr. Charles A. Peterson, Inspector of Immigrants, summarizes the grievances of contract labor in his 1899 Report:[21]

> The grounds of complaint have been corporal punishment, abusive language, unjust retention of pay, overtime and Sunday work and minor trivial matters.
>
> There have been found cases of personal castigation, of brutal and abusive overseers, of the docking system carried to the limit, undoubted extension of hours and compulsory Sunday labor. . . . . .

F. Plantation Strikes of 1900

Apparently the first successful strike in the history of the Territory took place at Pioneer Mill, Lahaina, Maui, from April 4, to April 13, 1900. The immediate cause of the strike was the fear that with annexation and the prospective discontinuance of the contract labor system, the workers would not receive the $2.50 monthly bonus to which they were entitled under their contracts. Dr. C. A. Peterson, Inspector of Immigrants, gives us this description of the Lahaina strike:[22]

> The strikers for ten days continued to meet, to parade the town under Japanese flags, to drill and even, unhindered by any one, demolished the house and property of a store clerk who would not give them credit. The town was terrorized by their threats and presence. Not a warrant was sworn out or any move made to restrain them. Finally, Manager Ahlborn assented to their demands and agreed to discharge the Luna, time-keeper,

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[21] Report of Dr. Charles A. Peterson, Inspector of Immigrants, "Report of the Bureau of Immigration for the Biennial Period Ending December 31, 1899," Page 44.

[22] File 51, Interior Department, Archives; report of Dr. C. A. Peterson, Inspector of Immigrants, MS.

> doctor, and interpreter, to pay $500.00 to the Consul for the relatives of each of (three) victims of the accident, to allow a nine-hour work day and to pay ten cents per hour for extra work, to pay the accumulated $2.50 bonus immediately and employ the interpreter they wished.

Dr. Peterson reports that a successful strike at Olowalu occurred during approximately the same period.

The planters broke a strike at Kihei, Maui, occasioned by the two previous successful strikes. According to Dr. Peterson, the Kihei strikers:[23]

> . . . herded into Wailuku. There, on a charge of leaving work they were fined and ordered back to work and upon refusal many were employed on the roads . . .

A 1901 Laundrymen's Strike reported in the July 10, 1901 issue of *The Hawaiian Star* resulted in the issuing of a warrant for arrest of sixteen strikers for conspiracy for inducing others to stop work. The *Star* reports:[24]

> Judge Gear issued a warrant today for the arrest of sixteen Chinese on charges of conspiracy. The warrant was made on the complaint of Chu Fun, a laundryman on Liliha Street. This warrant was issued as the outcome of the present strike of Chinese washmen, which is still in progress.
>
> According to the statements of the complaining witness the Chinese workers have banded together for the purpose of compelling the proprietors of wash houses to employ only members of their union and to pay these employes such prices as they demand. Chu Fun employs eight men but the union succeeded in inducing them to stop work with him and join their forces. The result was that Chu Fun's business, under the name of Kim Sing, was badly crippled.

II. CONDITIONS OF LABOR AFTER ANNEXATION

A. Civil Rights

But annexation, the abolition of contract labor, and the extension of the protection of the Constitution of Hawaii did not eliminate the troubles of plantation labor.

The third report of the Commissioner of Labor on Hawaii in 1905

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[23] *Ibid.*

[24] *The Hawaiian Star,* July 10, 1901.

at Page 141 recognizes the continued violations and disregard of civil rights:[25]

> The old custom and the habit of regarding Japanese and other Orientals as people of inferior civil status as compared with whites still prevail in Hawaii and manifest themselves in a hundred unconscious acts on the part of the managers and overseers, who have never considered that in the strict letter of the law residents of a foreign country domiciled within our territories have the same rights to protection of person and property and to privacy and respect as ourselves. At the time of the Lahaina strike (late in May, 1905), militiamen and police went in squads to the rented quarters of the strikers in the town of Lahaina—not upon the plantation itself—entered without ceremony or shadow of legal right and roused the inmates, using persuasion that came but little short of force to get them out to a conference which the management desired to hold with the men and which they, in the exercise of their rights, declined to attend. One of the most liberal and progressive managers in the Islands spoke with lively resentment of the criticism made by a judge of an act of one of his overseers, who had without legal authority or warrant forced open the door of a house occupied by Porto Rican laborers suspected of theft, dragged the occupants from their bed, and discovered stolen property in their possession.

B. 1909—Japanese Strike

Fortunately, the 1909 Japanese strike is rather fully reported in the remarkable case of *Territory of Hawaii v. Soga,* 20 Haw. 71, sustaining a conviction for conspiracy against the leaders of the Higher Wage Consummation Association. The charge was concerting together "to do what plainly and directly tended to incite and occasion offense and to do what was obviously and directly injurious to another" by conspiring to prevent certain corporations owning sugar plantations in the County of Honolulu from carrying on their business and operating their plantations, and thereby impoverishing them by preventing them from carrying on their trade or business. The means charged were threats of violence directed against the corporations and all Japanese in the City and County who did not join with the Higher Wage Association.

The evidence in support of the threats of violence, were articles appearing in a Japanese newspaper, the *Nippu Jiji,* in support of the

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[25] Third Report of the Commissioner of Labor on Hawaii, 1905, Page 141.

Association which urged "sticking together" to secure higher wages, "whatever the consequences," and other implied threats, which the conspirators did not denounce; letters received by leaders from members of the Association counseling force, which letters were procured from a safe stolen from one of the conspirators with the assistance of the police; a draft of a play attacking an opponent of the strike—likewise found in the stolen safe; and speeches made by the conspirators "intended to stir up the laborers."

The demands of the Japanese strikers formally presented to the Hawaiian Sugar Planters Association in January, 1909, were equal pay with Portuguese and Puerto Rican workers doing the same kind of work. At the time the strike began on May 10, 1909, the Japanese workers were receiving eighteen dollars a month for twenty-six working days or approximately sixty-five cents a day. Portuguese and Puerto Ricans doing the same work were receiving twenty-two dollars and fifty cents, better housing and an acre of land to till.

From the outset the daily press referred to the strikers as conspirators. Thus, the *Pacific Commercial Advertiser* carried the headline on the beginning day of the strike, "High Wage Conspirators Stir Up a Strike at Aiea Plantation." The same paper on May 20 carried an editorial entitled "What is Back of the Strike."[26] The editorial insisted that everyone was contented until the leaders of the strike:

> . . . . stirred up rebellious blood among the more ignorant coolies and these, in turn, have compelled the intelligent Japanese to side with them. Success of the strike would mean establishment of a labor oligarchy the planters would have to deal with thereafter; and to keep it from ordering strikes on any and every pretext they would be forced to subsidize it heavily. Blood money from the planters and dues from the laborers would give the hui the income of a bank; and with such buying resources it could even cut a figure in politics and legislation. No one can estimate what harm to the business community might finally result.

The strike spread despite the universal attack on the strike and its leaders. The *Pacific Commercial Advertiser* reported on May 25 that the plantations were continuing operations with seven thousand men out.[26a] Strike breakers were paid a dollar fifty a day[26b]—eighty-five

[26] *The Pacific Commercial Advertiser,* Walter G. Smith, Editor, May 20, 1909.

[26a] *Ibid,* May 25, 1909.

[26b] *Ibid,* June 2, 1909.

cents more per day than the Japanese workers were earning at the beginning of the strike, and almost double what their demands were.

On June 10, eleven strike leaders were arrested and held in jail for investigation, although no charges were preferred against them.[26c] The next day an attorney for the strikers by the name of Lightfoot applied to Circuit Court Judge Robinson for a writ of habeas corpus, but the writ was denied.[26d]

At the time of the hearing, the *Advertiser* reports about fifteen hundred Japanese gathered in front of the Judiciary Building, and that:

> A warning was given the Japanese last night that their demonstrations before the Judiciary Building were not to be allowed any more. Handbills in Japanese were distributed by the deputies of the High Sheriff, *drawing attention to the law regarding unlawful assemblies* and stating that there was no need of the entire Japanese population of the island assembling at the Judiciary Building. It was promised that seats for forty Japanese would be reserved in the court room during the trials of the leaders and that no more than forty would be necessary to see that the trial was conducted fairly.[26e]

The strike leaders were finally released on bail after charges of disorderly conduct and conspiracy were preferred against them. W. A. Kinney of the law firm of Kinney, Ballou, Prosser & Anderson, attorneys for the planters who were made counsel of record assisting the prosecution on the motion of Attorney General Hemenway, protested the release of the prisoners on bail. According to the *Advertiser*:[26f]

> Kinney declared that the power existed in the discretion of the court to remand the prisoners without bail, even if they were only held as witnesses. He said that the opinion of the Attorney General should be sufficient foundation for the court refusing bail, it being plain that the interests of justice would be defeated by allowing the witnesses to go free and be influenced by the threats of others. . . . It is a criminal organization that we have to deal with and if these men are allowed to be bailed out as soon as arrested it will soon become a question as to where the Government actually is.

[26c] *Ibid,* June 11, 1909.
[26d] *Ibid,* June 12, 1909.
[26e] *Ibid,* June 12, 1909.
[26f] *Ibid,* June 13, 1909.

Red-baiting, modern style, was introduced by the *Advertiser* in a June 14 editorial entitled "False Sympathy for the Strikers":[27]

> We further believe that there is altogether too much encouragement given the Japanese strikers by a number of white residents of this city, citizens radically socialistic in their views and ready to defend and to justify violation of the laws framed for the protection of capital. . . .

By June 17, fifty-five indictments by the Territory and one by the United States[27a] had been returned against the strikers, a majority of them being conspiracy charges.[27b]

On July 9, Circuit Court Judge Robinson issued an injunction against the *Nippu Jiji* ordering it to put an end to articles that included threats of boycott or ostracism, and thirty-three strike leaders were enjoined from committing any acts of violence described in the complaint and from picketing places where employees of the Oahu Sugar Company and other Japanese laborers frequented for the purpose of intimidating them.

When the pickets were orderly, they were described as "military" and enforcing a court-martial system against violators of the association's prohibition against force. "The system," the *Advertiser* reports, "has become so perfect that it has practically stopped desertions to the sugar fields."[28]

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[27] *Ibid,* June 14, 1909. At this time there was no organization of socialists in the Territory. However, in 1912, a Socialist party was organized in the Territory. Its secretary, Mr. Julius Rosenstein who still resides in Honolulu, informed the writer that he was subpoenaed to appear before the grand jury in 1912 and asked whether he had communicated with Samuel Gompers and informed him that workers in the Territory of Hawaii were living in a state of peonage. He denied that he had ever been in communication with Mr. Gompers, although he indicated to the grand jury that he felt the substance of the statement was in accord with the facts.

[27a] *Ibid,* June 4, 1909. According to the *Pacific Commercial Advertiser,* Ochiyama, a strike leader at Kahuku, was arrested by the United States Marshal on June 3. "His offence," according to this issue of the *Advertiser,* "consisted in having gathered up a number of copies of the *Hawaii Shinpo* (an anti-strike Japanese paper) and mailed them back to Editor Sheba with the word 'traitor' written conspicuously across them."

[27b] *Ibid,* June 17, 1909.

[28] *Ibid,* July 15, 1909.

The *Advertiser* on July 20 castigated a jury and branded the jury system as a venerated humbug following a hung jury on a riot charge against five Japanese strikers from Waipahu:[29]

> The guilt of the prisoners seemed clear to those who heard the evidence impartially. Yet there was a mistrial because a number of the jurymen were hostile to the sugar corporations and did not care how much they might be embarrassed by the strike. They did not attempt to deal justly. They simply wanted to "do" the planters.

It was further suggested in the same *Advertiser* that an investigation would probably be made of the conduct of the jurors.

The *Advertiser* reports on September 14 that it was difficult to get a jury in the second trial of the riot case. The jury finally impaneled on September 11 consisted of eight whites, three part Hawaiians and one Hawaiian; after a fourteen day trial the jury deliberated twenty-six hours and failed to agree.

The *Advertiser* on September 29 reports:[30]

> "RIOT JURYMEN FAIL TO AGREE—Deliberated Twenty-Six Hours—Defendants Go Free.
>
> "The jury was hung by one man, said to be Joseph I. Whittle, a painter, who announced that he would not give in if the jury were kept out a year. He voted throughout for acquittal and is said to have devoted most of his time to making disparaging remarks about the sugar planters."

The strike was lost and the Association voted to return to work with no wage increase on August 5, 1909.

C. Interference by Planters and Government With Right of Free Labor to Leave

By 1905 the sugar planters were pretty much disillusioned about the docility of Japanese laborers. In 1906 the importation of Filipino laborers began.

A striking picture of the violation of civil rights of Filipino workers by the legislature and the courts is described by Ray Stannard Baker in the *American Magazine* for January, 1912, entitled

[29] *Ibid,* July 20, 1909.
[30] *Ibid,* September 29, 1909.

"Human Nature in Hawaii; How the Few Want the Many to Work for Them — Perpetually, and at Low Wages:"[31]

> The planters, indeed, have now reached the point where they are willing to employ all the devices of legislation, not only to get laborers, but to force them to remain in the islands. Of the methods pursued under the leadership of one of the foremost lawyers of the islands, Mr. W. A. Kinney, I had a vivid illustration just as I was leaving Honolulu (spring of 1911). Quite a number of Filipinos had purchased tickets and were about to depart for California. Just before sailing, officers came aboard and arrested several of these men and took them ashore with their bags and belongings. The same methods were pursued in the case of another ship which departed on the same day. Blacker looks of anger and disapointment I have rarely seen on men's faces than I saw on the faces of these men.
>
> I made immediate inquiry and found that these men were not wanted for any crime or misdemeanor whatever, but were arrested *as witnesses* to appear against an immigration agent who was in Hawaii recruiting laborers for Alaska, just as agents of Hawaii have long been in other countries recruiting laborers. Of course, it was a mere barefaced device to prevent the Filipinos from getting away from Hawaii.
>
> A few days later, it was discovered that a vessel—the *Senator* —had come to the islands especially to take away workmen— mostly Filipinos. A man named Frank Craig, an immigration agent, although he held a license from the Territory, was arrested and locked up. Then the planters' interests went to the legislature, which was then in session, and demanded the passage of a new and stronger law to prevent the activities of immigration agents. In the meantime the *Senator* hovered in the offing like some pirate vessel. A large number of Filipinos were there and wanted to go. They were free men, and yet they were watched and detained by the authorities. Nevertheless, a hundred or more of them escaping the vigilance of Mr. Kinney and his forces, embarked in small boats in the night and succeeded in reaching the *Senator* and in sailing for San Francisco.
>
> Of course, the planters felt aggrieved; they had paid high prices for bringing in the Filipinos and they needed workmen —but this was a plain, bold attempt to constrain the rights of free men by the use of the machinery of the law.

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[31] Ray Stannard Baker, "Human Nature in Hawaii; How the Few Want the Many to Work for Them — Perpetually, and at Low Wages," *American Magazine,* January, 1912, Pages 328-339.

In the meantime the legislature was being pressed to pas immediate laws to prevent the recurrence of any such inciden as that of the *Senator*. The following law was finally enacted

> Any person who, by promise of employment outside th Territory of Hawaii, shall induce, entice or persuade, o aid or abet in inducting, enticing or persuading, any servan or laborer who shall have contracted, either orally or i writing, to serve his employer for a specific length of time to leave the service of said employer during such time without the consent of said employer, shall be guilty of misdemeanor and upon conviction thereof shall be pun ished by a fine of not more than five hundred dollars, o by imprisonment for not more than six months, or b both such fine and imprisonment.

First, tangle the ignorant workman up with a contract "ora or written" and then make it a criminal offense to offer hin a better job outside of Hawaii than he has in Hawaii! Alread a young Filipino named Alvarado has been sentenced to a yea in prison for offering employment in California to workin people in Hawaii.

Unwilling to pay more wages to keep their laborers, th planters are thus using their control of the machinery of th law to force the laborers to remain. How does this differ i principle from serfdom?

The complacency with the "serfdom" that Mr. Baker found shock ing is apparent in a March 31, 1911 article in the *Pacific Commercia Advertiser*:[32]

> Sheriff Jarrett has a pile of subpoenas he cannot see over t serve upon Filipino witnesses wanted to testify in the charg brought by the Territory against de Gussman, being investi gated by the Grand Jury on allegations that he is solicitin labor here without a license. The sheriff tried to serve the paper yesterday but was prevented by the laws of quarantine.
>
> The Filipinos wanted are among the number being held i detention by the federal quarantine officers in order that the may qualify as outgoing steerage passengers today on th Korea. If the Sheriff and Harry T. Lake, who is assisting him had been admitted among the quarantined bunch, the requisit guarantee that none of the steerage possibilities had come int contact with Honouluans could not be issued by the healt authorities.

[32] *Pacific Commercial Advertiser,* March 31, 1911, Page 1.

The delay in serving the summons to appear and testify will not be of any particular benefit to the expectant labor recruits for California, however, as they will be attended to as soon as they are turned over to the Pacific Mail officials today for shipment. Honolulu will be blest by their presence for some little time to come.

Yesterday, twelve Filipinos were committed to Judge Lymer for having disregarded their grand jury summons and will meditate over the intricacies of American law for a few days in the bastile.

After the subpoenas now issued are served, there will be in the neighborhood of three hundred witnesses to be examined in the de Gussman case.

That the sugar planters or their representatives in the legislature were not disposed to reform voluntarily is indicated by a report contained in the Pacific Commercial Advertiser for March 3, 1921:[33]

On recommendation of the judiciary committee three house labor bills, introduced by Representative Lorrin Andrews at the request of the Central Labor Council, were tabled in the senate at yesterday morning's session. They were:

H.B. 31, seeking to prohibit employers from coercing employes in the purchase of things of value.

H.B. 35, to provide for the furnishing of service letters by public utility corporations to employees leaving their services.

H.B. 36, providing that any public service corporation employing spotters shall, before disciplining or discharging any employee, accord a hearing to such employee.

D. 1920 Japanese and Filipino Strikes

The general unrest of labor in the United States following World War I affected Hawaii also.

In 1919 the Japanese organized a series of labor organizations on the various islands and late that year combined them into the Federation of Japanese Labor in Hawaii. The Filipinos formed a Filipino Labor Union.

In December, 1919, the Japanese Federation formalized its grievances in a resolution submitted to HSPA. It read:

[33] *Pacific Commercial Advertiser,* March 3, 1921, Page 1.

We are laborers working on the sugar plantations of Hawaii

People know Hawaii as the Paradise of the Pacific and as a sugar producing country, but do they know that there are thousands of laborers who are suffering under the heat of the equatorial sun, in field and factory, and who are weeping under 10 hours of hard labor and with the scanty pay of 77c a day?

Hawaii's sugar! When we look at Hawaii as the country possessed of 44 sugar mills, with 230,000 acres of cultivated land area, as a region producing 600,000 tons of sugar annually we are impressed with the great importance of the position which sugar occupies among the industries of Hawaii. We realize also that 50,000 laborers who, together with their families number about 160,000, are a majority of the 250,000 total population of Hawaii. We consider it a great privilege and pride to live under the Stars and Stripes, which stands for freedom and justice, as a factor of this great industry, and as a part of the labor of Hawaii.

We love production. Fifty years ago, when we first came to Hawaii, these islands were covered with ohia forests, guava fields, and areas of wild grass. Day and night did we work cutting trees and burning grass, clearing lands and cultivating fields until we made the plantations what they are today. Of course, it is indisputable that this would have been impossible if it were not for the investments made by the wealthy capitalists and the untiring efforts of the administrators. But we believe that the impartial public will not only magnify and praise the efforts of the capitalists, but will not hesitate to recognize the work of the laborers who have served faithfully with sweat on their brows. We are faithful laborers who love labor and production.

Look at the silent tombstones in every locality. Few are the people who visit these graves of our departed friends, but are they not emblems of Hawaii's pioneers in labor? Turn your eyes to the ever diligent laborers. They are not beautiful in appearance, but are they not a great factor of Hawaii's production?

We are faithful laborers, willing to follow the steps of our departed elders and do our part towards Hawaii's production. We hear that there are in Hawaii over 100 millionaires, men chiefly connected with the sugar plantations. It is not our purpose to complain and be envious, but we would like to state that there are on the sugar plantations which produced these fortunes for their owners a large number of laborers who are suffering under a wage of 77 cents a day.

When asked, "What is a laborer?" a certain plantation manager is said to have replied, "A laborer is an ignorant creature."

We do not wish to believe such a statement, but when we look back over our own experience in Hawaii, we regret to state that the above fact is undeniable.

Impartial and just ladies and gentlemen, we are laborers working on the plantations of Hawaii. Certain capitalists may regard us as ignorant creatures, but as laborers working seriously and faithfully we wish it understood that we are willing to do our part toward Hawaii's production and welfare as best we know how, hoping for the progress of civilization and endeavoring to safeguard justice and humanity as members of the great human family.

The resolution was accompanied by a list of demands which included:

1. An increase from 77c to $1.25 a day. Women laborers to receive a minimum of 95c a day.
2. The bonus system to be made a legal obligation rather than a matter of benevolence.
3. An eight-hour day.
4. Maternity leave with pay for women two weeks before and six weeks after birth.
5. Double-time for overtime, Sundays and holidays.

These demands were first submitted to the Hawaii Sugar Planters Association on December 4, 1919. They were flatly rejected.

The workers sent two representatives to discuss their grievances with the Hawaii Sugar Planters Association but were refused an interview.

On January 19, 1920, members of the Filipino Laborer's Association went on strike on six Oahu plantations. This organization also contained large numbers of Chinese, Portuguese and Spanish workers. Four days later, the Japanese workers struck. The workers' publication summarized the viewpoint of the strikers:

The door was closed before our eyes; there was no more room for negotiation. The time had finally come when we were compelled to resort to our last means.

For two months, ever since our first request, we had been pleading our cause sincerely, honestly, seriously and earnestly without a thought of plot or scheme. We had tried every peaceful method we knew of, with the hearty cooperation of capital and labor in mind. We do not wish to strike. We want peace and order; we love labor and production. But when we think

> of the group of capitalists who show no sympathy whatever toward the struggling laborers, turn deaf ears to their cries and reject their just and reasonable demands under the pretense that they are formulated by "agitators," we cannot remain silent. We must act. And so we went on strike. . . . So, strike we did, honorably and bravely, as laborers living under the great flag of freedom and justice. We were obliged to strike. This is a strike we disliked, a strike we tried to evade. We trust that the unprejudiced will find out the true source wherein the fault lies before forming any judgment.

"An American citizen who advocates anything less than resistance to the bitter end against the arrogant ambition of the Japanese agitators is a traitor to his own people," the *Honolulu Star-Bulletin* editorialized .

On February 14, the planters issued an eviction notice ordering "every laborer unless sick or for other good reasons is unable to work, to be at his place of employment next Wednesday morning, February 18, or otherwise, to leave the plantation upon which he has been employed forthwith."

When the workers failed to vacate, the planters sent guards who forcibly evicted the strikers, and removed their belongings from the company houses. Twelve thousand and ten people were evicted. Of these, 1,472 were Filipinos. Five hundred and thirty-eight Japanese were evicted. Of the total number, 2,643 were women, and 3,856 were children.

In February, 1920, Honolulu was in the midst of an influenza epidemic. The epidemic spread to the strikers who were living in temporary shelters with inadequate sanitary facilities. Before the epidemic passed, about 1,200 strikers and their families died from influenza.

Estimates are that the Hawaii Sugar Planters Association spent $12,000,000 fighting the strike; the Japanese Federation received in strike assessments and contributions $681,499.

Immediately after the end of the strike, the Hawaii Sugar Planters Association made efforts to import coolie labor to the islands to supplant the Japanese and Filipino workers.

George Wright, speaking for the Honolulu Central Labor Union, told the Congressional Committee, in opposition to the coolie importation, that there was no labor shortage, but rather that men

had been driven from the plantations by intolerable conditions and were still available if the planters would pay them a living wage. He also testified that the charges of nationalism against the Japanese in the 1920 strike had no basis in fact but that the issue was entirely economic.

In a hearing before Congress, Royal D. Mead, secretary of the Hawaii Sugar Planters Association said:

> . . . The Territory of Hawaii is now and is going to be American; it is going to remain American under any condition and we are going to control the situation out there. . . . *The white race, the white people,* the Americans in Hawaii are going to dominate and will dominate.

Congress refused to pass legislation permitting the planters to bring in coolies. The Hawaii Sugar Planters Association returned to the Philippines for its labor supply.

During the strike, on August 1, 1921, twenty-one strike leaders were indicted for conspiracy to dynamite the house of J. Sakamaki, an outspoken opponent of the strike. The incident had occurred on June 3, 1920, shortly before the termination of the strike. Four of those indicted were not apprehended. The case against the two who turned state's evidence were nolle prossed. The fifteen remaining were convicted and sentenced to serve a minimum of four and a maximum of ten years. An appeal by way, of a bill of exceptions, was taken to the Supreme Court of the Territory. The case is reported in 27 Haw. 65.[34] The fifteen convicted were, with one or two exceptions, as appears from the court report, top leaders of the Union on Oahu and Hawaii.

The testimony introduced showed that only Murakami, Saito and Matsumoto actually participated in placing the dynamite under Sakamaki's house. No loss of life occurred but the house itself was damaged. Two of the three alleged conspirators, Saito and Matsumoto, testified for the government. They claimed that the Union failed to pay them a promised $5,000. A third government witness, who was not indicted, testified that he procured the dynamite. The court, although it conceded several errors of the trial court, found none of them prejudicial.

[34] *Territory v. Goto,* et al., 27 Haw. 65.

The appeal being by bill of exceptions rather than writ of error, no appeal lay to federal courts. A petition for a writ of habeas corpus was denied by the Federal District Court for the District of Hawaii. That denial was upheld by the United States Supreme Court in *Goto v. Lane,* 265 U.S. 393. (See Note 1 of the memorandum.)

E. 1924 Filipino Strike

The 1924 Filipino Strike hit a new high in arrests and criminal prosecutions. The following summary of the strike appeared in *The Hawaiian Annual for 1925:*[35]

> An unjustifiable strike movement of Filipino laborers, the result of designing agitators, began April 1st on some of the Oahu plantations, and gradually affected certain others on the other islands. By the middle of August the discontented and intimidated idlers numbered some 1600 at all points, with threatening aspect at Hilo, Lahaina, Kalihi, and Kapaa. September 9th the strikers precipitated a riot at Hanapepe, Kauai, resisting police rescue of the two intimidated men held in the strikers' camp, in which four policemen and sixteen Filipinos were killed, and a number of others wounded. The rioters were finally overcome and arrested, and on trial, sixty of the seventy-six participants were sentenced each to a four-year prison term, the ringleaders all being beyond pale of earthly courts.
>
> Pablo Manlapit and Cecil Basan, prominent strike agitators, were sentenced September 27th of subornation[35a] of perjury, and each sentenced to two years in jail.

Denunciation of the strike leaders and of their sympathizers among the Japanese editors and elsewhere, by the English press, was violent, particularly after the Hanapepe incident. *The Star-Bulletin,* for example, editorialized on September 11, 1924:[35b]

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[35] *The Hawaiian Annual for 1925,* Pages 126-127.

[35a] According to the *Honolulu Star-Bulletin,* September 10, 1924, Manlapit and Basan were charged with subornation of perjury for soliciting the father of a child who died to say that the child was "ejected" from Waipahu Plantation Hospital, and publishing the story in the Filipino newspaper edited by Basan as propaganda against the planters five days after the strike began. The plantation doctor, it is stated, advised the parents that the child was too ill to move, but they did not follow his advice and the child died.

[35b] *Honolulu Star-Bulletin,* Sept. 11, 1924, Riley H. Allen, Editor.

> Besides the soft-handed and soft-living Filipino "leaders" of the Manlapit type, and besides the Japanese who are encouraging the Filipinos and hoping the strike will win, there is a heterogeneous group of "red," "pinks," and "yellows"—"wobblies" and communists and crack-brained demagogues—who have aligned themselves with the strikers and are doing their bolshevik best to turn Hawaii into anarchy.
>
> We state that issue again: one one side, law-abiding Americanism; on the other side, criminal labor conspiracy and violence, alien nationalist support, "red" agitation and anarchistic propaganda.

The Hanapepe incident took place on September 9; four policemen and sixteen strikers were killed.[35c] One hundred and thirty-three Filipinos were arrested, of whom seventy-six were indicted for rioting. The remaining forty-seven pleaded guilty to charges of assault and battery and were released under thirteen months' suspended sentence. On October 10, four of the seventy-six pleaded guilty of rioting and seventy-two not guilty.[35d]

The trial of the seventy-six was held in the Circuit Court of the Fifth Judicial Circuit at Lihue, Kauai, Judge William C. Achi presiding. The jury deliberated seven hours. Two defendants were sentenced to four years and eleven months for rioting; fifty-eight to four years; sixteen were acquitted.[35d]

Early in the strike, Cecilio Basan, editor of the Filipino paper supporting the strikers, and a Gregorio de la Cruz were arrested on charges of malicious burning of a cane field. De la Cruz was held fifty-four days in the county jail for "investigation" by Detective Chief John R. Kellett. On October 18, they were found guilty of malicious burning in the third degree.[35e] Basan was sentenced to hard labor for a term of from three years six months to five years; De la Cruz for a term of five years.[35f]

According to the *Star-Bulletin* of September 13, 1924, special prosecutors paid by the planters were sent by the Attorney General's office to Hawaii to prosecute violations of law which occurred on that island:[35g]

[35c] *Honolulu Star-Bulletin,* September 9, 1924.
[35d] Ibid, September 23 and October 10, 1924.
[35d] *Ibid,* November 8, 11, 1924.
[35e] *Ibid,* October 20, 1924.
[35f] *Ibid,* editorial, October 23, 1924.
[35g] *Ibid,* September 13, 1924.

> Owing to the lack of sufficient funds, the territorial government has been forced in the present emergency to accept the support of the Hawaiian Sugar Planters' Association for the payment of the special prosecutors involved.

Three strikers on Hawaii were arrested and charged with violating the anti-picketing ordinance passed by the Legislature the preceding year. One was convicted in the District Court at Honokaa, and two were discharged. The appeal of the convicted striker to the Circuit Court resulted in a mistrial.[35h]

Four strikers were charged under the criminal syndicalism act, according to the *Star-Bulletin* of September 30; these four had allegedly used threatening language at a strike meeting saying, "The face of the earth would flow with blood. They call Filipinos 'poke-knife.' We will show them the Filipinos who are called 'poke-knife'."[35i]

They were acquitted by a jury.

F. Organization—1924 to 1937

From 1924 to 1937, no notable or sizeable strikes of plantation labor occurred. That the plantation attitude toward labor did not change during this period of "labor peace" is illustrated by a statement made in 1929 by R. A. Cooke, president of the Hawaii Sugar Planters Association.

> As has been emphasized again and again, the primary function of our plantations is not to produce sugar but to pay dividends.

The following year, he said:

> I can see little difference between the importation of foreign laborers and importation of jute bags from India.

The reason for lack of labor organization during this period, according to William Crozier, Territorial House of Representatives, as told a special sub-committee of the Legislature, was:

> Any working man who tries to organize and bargain collectively to better the condition of himself, wife and children, is

[35h] *Honolulu Star-Bulletin,* September 30, 1930.
[35i] *Ibid,* September 24, 1930.

looked upon as a communist, a radical, a socialist and a red . . . The Employers discharge men for joining Unions in Hawaii.

G. 1937 Maui Filipino Strike

In 1937, an organization of Filipino workers, the Viboro Luviminda, led by Antonio Fagel, struck at Puunene, Maui. About a thousand workers began the strike in April, but before the strike ended in July, the strikers were joined by approximately three thousand more Filipino field workers on Maui.

On May 19, the *Star-Bulletin* reports the issuing of warrants for the arrest of Antonio Fagel and nine other strikers. According to that paper they were:[36]

> . . . charged with conspiracy to commit unlawful imprisonment. Authorities who swore out the warrants charged five strikers, already under arrest, with seizing a non-striking Puunene worker and forcing him to accompany them to strike headquarters here (Wailuku) and sign a pledge to join the walkout. Fagel and four others were alleged to have been in strike headquarters at the time and to have obliged Anastasio Manangan to sign the statement.

On May 21, all but three were freed on $200 bail. The trial began June 17, but was postponed a few days to allow Grover Johnson, International Labor Defense Attorney, to arrive. On June 23, Judge D. H. Case granted a change of venue to Honolulu, at the request of County Attorney Bevins, who based his motion on apparent inability of the court to obtain a jury to hear the trial. A jury was selected on August 10, 11 and 12. The trial began on August 17, and ended September 9. Judge H. E. Stafford granted a directed verdict of "not guilty" for one defendant, Macario Quicio. On September 9, Antonio Fagel, his chief aide, Florentino Cabe, and six others were found guilty of conspiracy in the third degree. All but Fagel received suspended sentences of thirteen months and a nominal fine. Fagel, however, preferred four months in the City and County Jail, saying, "If I am on probation, what is to prevent them from bringing me in court again?"

In the course of the trial, Judge Stafford excoriated Maui police

[36] *The Honolulu Star-Bulletin,* May 19, 1937.

methods and threw out the confession allegedly made. *The Voice of Labor* for September 2, 1934, reports:[37]

> Four confessions allegedly made by Filipinos on trial for the Maui strike were tossed out of court Thursday, after Judge H. E. Stafford had uttered a scathing denunciation of Maui police methods used in obtaining statements.
>
> Admission of the confessions was strenuously objected to by Grover Johnson, ILD attorney, on the ground that they were obtained by inducement, fraud, intimidation and duress. The defense thereupon called each of the defendants to the stand, each of whom testified that they had been locked in dark cells at Wailuku for three days, that the cells were so dark they couldn't tell night from day. . . .
>
> The defendants testified the cell was absolutely bare of any equipment and they were forced to lie upon the cement floor. After the long confinement, the exact duration of which was known by the men, they were taken from their cells and brought before a Filipino cop, Rafael Guanzon, who read their "confessions" in part and told them that if they signed they would be released but that if they didn't sign the statements, they would be returned to the dark cells until they did sign.

On September 9, the *Voice of Labor* reported:

> Prosecution was handled by William Lymers who "in court admitted that he expected to present to the HSPA a bill for his services in the case."

H. Inter-Island Strike—The Hilo Massacre

The next year, 1938, in May, the seamen and longshoremen of the Inter-Island Steam Navigation Company struck for three months.

According to the *Star-Bulletin,* June 14, twelve strikers were arrested for investigation. Nine were booked for assault and battery, interfering with a police officer, and malicious injury.[37a]

According to the *Hawaii Hochi* on June 15, one of the men, Domingo Saldana,

> . . . was observed helplessly attempting to dodge a rain of "blackjack" blows by uniformed and special police officers, while being held in an armlock by other police.[37b]

[37b] *Hawaii Hochi,* June 15, 1938.

[37] *The Voice of Labor,* September 2, 1937.

[37a] *The Honolulu Star-Bulletin,* June 15, 1938.

Five of the men were tried. One was convicted of assault and battery and Saldana got twenty days for damaging a car.

On August 1, an Inter-Island ship, the *S. S. Waialeale,* manned with a crew of strike-breakers, docked at Hilo to unload cargo. Preparations had been made by the police force to prevent the picketing of the vessel when it arrived. Barricades had been erected by the police and the assembled crowd was ordered to stay away from the vicinity of the dock. When the strikers and strike sympathizers began to picket, the police fired rifles into the crowd. Tear gas and bayonets were also used by the police. Fifty-one strikers and strike sympathizers were shot or bayoneted. Harry Kamoku, President of the Hilo Longshoremen's Union, said at the time:

> They shot us down like a herd of sheep. We didn't have a chance. The firing kept up for about five minutes. They just kept on pumping buckshot and bullets into our bodies. They shot men in the back as they ran. They shot men as they were trying to help wounded comrades and women. They ripped their bodies with bayonets. It was plain slaughter.

The Attorney General of the Territory sent a special investigator to Hilo, Deputy Attorney General Edward N. Sylva. He issued a report, most of which was made public in the *Honolulu Star-Bulletin,* September 23.

During September, the Hawaii County Grand Jury also probed the affair. On September 20, the Grand Jury brought in a written report which read:

> To the Honorable D. E. Metzger
> We, the grand jury, duly impaneled to investigate the incident, which occurred at or near the Kuhio wharves and piers on August 1, 1938, after hearing all the evidence and after due deliberation, find that a state of emergency existed on that date and that said evidence is not sufficient to warrant an indictment against any person or groups of persons.

Judge Delbert E. Metzger, the Judge of the Circuit Court of the Fourth Judicial Circuit, of Hilo, according to the *Star-Bulletin* of September 20, stated from the bench when he received the report:[37c]

[37c] *The Honolulu Star-Bulletin,* September 20, 1938.

> This report reads to me more like a policy committee of some civic organization than that of a grand jury. "We find a state of emergency existed." This does not seem to mean anything as a matter of legal term. It is a matter of public knowledge that several men were grievously injured by shooting, by stabbing, by broken jawbones, or something of the sort.
>
> It seems rather strange to me that there was not any law violated by either one side or the other in an affray of that kind.

I. The Anti-Picketing Law

Picketing was prohibited by law in the Territory from 1923 until 1945, when the law was repealed by the territorial legislature. The law is the same type of law held unconstitutional by the Supreme Court of the United States in 1940 in the *Thornhill* and *Carlson* cases. In part the law provided:[38]

> It shall be unlawful for any person or persons, singly or conspiring together, to loiter about, beset, patrol or picket in any manner the place of business or occupation or any street, alley, road, highway or other place in the vicinity where such person may be lawfully engaged in his work.

That the law was invoked appears from the *Honolulu Star-Bulletin* of June 23, 1938:

> Jury trial on charges of violating the territorial anti-picketing law was demanded today by thirteen men and women arrested on warrants sworn out by Lewis Perkins Williams, co-owner of the Rialto Beer garden. . . .
>
> While the case was pending, an arrangement was made by the special assistant to the public prosecutor and the attorney for the Hotel, Restaurant and Bar Catering Asociation that two pickets might be permitted.

On July 21, 1938, Circuit Judge Le Baron rendered a decision upholding the law. The *Star-Bulletin* reported:[38a]

> Judge Le Baron's decision held that the territorial statute involved has not been repealed by the Wagner Act and the Norris-La Guardia anti-injunction law and is not modified by the federal anti-strikbreaking act.

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[38] Revised Laws, 1945, Sections 11520 to 11522. The Law was repealed by the Legislature during the 1945 session.

[38a] *The Honolulu Star-Bulletin,* July 21, 1938.

According to the same report, Judge Le Baron also held that:

> . . . mere patrolling for the purpose of publicity of any or all phases of a labor dispute (without obstructing or injuring the lawful business of another) was lawful. But if the purpose of picketing is to destroy or smash the victim's business by shutting off his usual source of business patrons and by threats to force the owner of a business to as such pickets demand, it violates fundamental rights guaranteed by the Constitution and is clearly not peaceful picketing.

J. Labor and Martial Law

After December 7, 1941, martial law wiped out the civil rights of all people in the Territory, but particularly workers. Laborers were frozen to their jobs by order of the military governor. Plantation workers could not leave their jobs without the permission of their employers. A wage freeze was decreed.

In December, 1942, Garner Anthony, Attorney General of the Territory, submitted a report to Governor Stainback, attacking martial law. The Report states:

> In place of the criminal courts of this Territory there have been erected on all the islands provost courts and military commissions for the trial of all manner of offenses from the smallest misdemeanor to crimes carrying the death penalty. Trials have been conducted without regard to whether or not the subject matter is in any manner related to the prosecution of the war. These military tribunals are manned largely by Army Officers without legal training. Those who may have had any training in the law seem to have forgotten all they ever knew about the subject.
>
> Lawyers who appear before these tribunals are frequently treated with contempt and suspicion. Many citizens appear without counsel; they know, generally speaking, that no matter what evidence is produced, the "trial" will result in a conviction. An acquittal before these tribunals is a rare animal. Accordingly, in most cases, a plea of guilty is entered to avoid the imposition of a more severe penalty. Those who have the temerity to enter a plea of not guilty are dealt with more severely for having chosen that course.

Not until March, 1943, was military control relaxed. With this relaxation, labor organization began on the plantations. Apprentice mechanics were earning a base pay of *28¢* an hour, field hand *25¢*, plantation clerks *19¢*, skilled mechanics *82¢*. Non-plantation un-

skilled labor was earning *82¢*. In 1944, five longshoremen from Honolulu who were attempting to organize plantation workers were picked up by the Provost Marshal and ordered to return to Honolulu. They were threatened with a change in their draft status.

In twelve months, *20,000* mill and field laborers were organized.

Every National Labor Relations Board election for the mill workers was won overwhelmingly. The Union, the International Longshoremen's & Warehousemen's Union, received 97 per cent of the votes cast. On Maui, in 14 elections the vote was 2,243 for the International Longshoremen's & Warehousemen's Union to 219 against. On Kauai, in 11 elections, the vote was 1,709 for the union, 18 against. On Hawaii, in 29 elections, the vote was 3,138 for the union, 161 against. Typical returns were the ones at Lihue Plantation Co. where the vote was 679 for the International Longshoremen's & Warehousemen's Union, 4 against. At Koloa Sugar Co., it was 173 for the International Longshoremen's & Warehousemen's Union, 1 against.

K. 1946 Bus Strike Conspiracy

Late in June, 1946, a majority of the employees of the Honolulu Rapid Transit Company became dissatisfied with the handling of negotiations by the officers of their union, the Amalgamated Association of Street, Electric Railway and Motorcoach Workers, and formed a new negotiating committee. The company refused to recognize the new committee. *The Honolulu Star-Bulletin* of July 12, 1946, reports:

> Three hundred and fifty HRT drivers voted to demand company recognition for a new negotiating committee, precipitating an intra-union dispute over negotiating authority. At eight this morning (July 12), the new committee told Governor Stainback there would be no strike, but drivers might not collect fares. At nine, HRT employees were told by A. A. Rutledge, chairman of the new negotiating committee, that the union would not instruct them to give free rides; that was up to individual drivers. Addison E. Kirk, president and general manager of HRT, warned that failure to collect fares violated territorial law and drivers caught giving free rides would be discharged.

A majority of the drivers, with the amused cooperation of the public, did not collect fares. Twenty-nine drivers were discharged

on July 12. The company ceased operating its busses because the drivers refused to state whether they would collect fares. After the twenty-nine discharged drivers were reinstated as a result of mediation of the dispute by representatives appointed by the governor, operations were resumed and fares collected.

On September 11, 1946, A. A. Rutledge and Henry Gonsalves, both officials of the Teamsters Union and advisers to the new union which had affiliated with the Teamsters union, Edward Collier, union president, George Kaisan, union secretary, and Henry Lopes and Manuel Dias were indicted for conspiracy. None of the twenty-nine employees who were discharged for failing to collect fares were indicted.

A challenge to the constitutionality of the conspiracy statute was overruled in June, 1947, and the trial began on July 24, 1947. On August 1, after twenty-one hours of deliberation, the jury returned a verdict of "not guilty" as to all defendants.

L. 1946 Sugar Strike

On September 1, 1946, after collective bargaining failed to produce an agreement, and after a vote in which 94 per cent of the ballots cast favored a strike, 25,000 sugar workers struck.

The demands of the strikers were:

1. A 65 cent minimum cash wage;
2. A 40 hour work week;
3. A union shop; and
4. A reduction in the cost of perquisites.

The strike lasted 79 days except at Pioneer Mill Company at Lahaina, Maui, where it continued until the first of the year until the Company agreed to arbitrate the discharge of ten strikers. These men were charged with criminal offenses, but not tried or convicted. The company discharged them for violation of Company rules for the alleged offenses involved in the criminal cases.

Except for twelve strikers on Kauai charged with the felony of contempt for violating an ex parte injunction limiting peaceful picketing, criminal charges against strikers were brought only in Maui County.

In Maui County, 125 strikers were charged with the following criminal offenses:

79 were charged with unlawful assembly and riot at Paia, Maui
22 were charged with riot, unlawful assembly, conspiracy and assault and battery at Lahaina, Maui
15 were charged with summary contempt of a restraining order limiting picketing to three
4 were charged with assault and battery
4 were charged with malicious injury
1 was ordered to show cause why he should not be put under a peace bond

All cases have been disposed of except the unlawful assembly charge against seventy-five strikers at Paia involved in this proceeding[39] and the contempt case which is pending before the Ninth Circuit Court of Appeals on appeal from the denial of a Writ of Prohibition by the Supreme Court of the Territory.[40]

The unlawful assembly, riot and conspiracy charges against the twenty-two strikers at Lahaina, Maui, were nolle prossed. The remaining cases were disposed of without trial.

The only corporal injuries involved in the 125 Maui cases were assault and batteries on three white supervisors at Lahaina, Maui, as a result of which 22 strikers were charged.

That the attitude of the daily press in Hawaii towards unions, and particularly the union chosen by the plantation workers, has not changed substantially in recent years, is apparent from the photostatic copy of a cartoon published in the *Honolulu Advertiser,* successor of the *Pacific Commercial Advertiser,* during the 1946 Sugar Strike.

M. 1947 Pineapple Strike

In the first three days of the five-day pineapple strike, two hundred and fourteen arrests were made, and four anti-picketing injunctions issued. The union voted on the fourth day to return to work without achieving its demands.

Seventy-five of the arrests occurred on the Island of Lanai, Maui County. Seventy-three persons, including the individual plaintiffs,

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[39] The 1946 indictment was declared defective by the Territorial Supreme Court in an interlocutory appeal, but the statute was held constitutional. The 1947 Maui Grand Jury reindicted for riot and added a new conspiracy count.

[40] *ILWU v. Wirtz,* 37 Haw. 404, #11,568, before the Ninth Circuit Court of Appeals.

were charged on police complaint with unlawful assembly and riot. After the strike was broken, charges against thirty-two strikers were dropped when the prosecution was unable to adduce evidence of these persons even being present at the time the alleged riot occurred.

On the Island of Oahu, there were one hundred and thirty-one arrests. One hundred were nolle prossed after the strike was over including one complaint charging violation of the anti-picketing law repealed in 1945; three were tried in the District Court and found not guilty; one was found guilty. One was acquitted after a jury trial. Charges of obstruction of the highway, profanity and disorderly conduct were disposed of on nolo pleas, and small fines were assessed.

Specific charges of police brutality were made by the union, and a public hearing before the Police Commissioner was demanded but refused.

On Kauai, twelve strikers were charged with obstructing the highway and malicious injury, one with criminal trespass (sitting under a palm tree on company property), and one with assault and battery. All charges except obstructing the highway were nolle prossed and on pleas on nolo contendere, fines were assessed.

III. LABOR INJUNCTIONS

In the 1946 sugar strike, two ex parte restraining orders drastically limiting peaceful picketing were issued. Two cases involving charges of contempt of these orders are now pending in the Ninth Circuit Court of Appeals.

In the Fishermen's Strike in 1947, an injunction was issued by Judge Cassidy of the First Circuit Court. The return showed that the strike had terminated, before the return day, and asked for the dissolution of the ex parte order on that ground. At the request of the attorney for Hawaiian Tuna Packers, and over the strenuous objections of attorneys for the union, the judge refused to dissolve the ex parte order and "suspended" its operation indefinitely.

In the 1947 pineapple strike, five injunctions drastically limiting peaceful picketing were issued by three circuit judges. Seven months after the voluntary dismissal of the equity suit, contempt proceedings were instituted by a special deputy attorney general against fourteen persons for alleged violations.

In July, 1948, at the instance of the Honolulu Rapid Transit Company, a circuit court judge restrained a strike on the ground the union had failed to comply with the Public Utilities Strike Act. The union contended that it had already gone through the cooling off period and mediation provided in the Act, but the company contended that since it had made additional demands, the procedures of the Act must be gone through again. The judge recognized in his decision that the attorney general was the proper plaintiff, but granted the injunction on the company's petition because of the interest of the public in continuing service. The hearing was held from two to five in the morning to prevent a stoppage of bus service since the members of the union insisted in appearing personally in response to the Summons issued against them.

IV. OTHER LAWS AND PRACTICES OF LAW ENFORCEMENT AGENCIES AFFECTING LABOR

The Territory has a so-called forty-eight hour law under which any person can be arrested and held for forty-eight hours on suspicion that a crime has been committed. Police officers do not advise persons arrested and held as to what are their rights not to testify against themselves, or warn them that statements they make will be used against them.

The result of the use and operation of the law is that the well-educated and well-to-do who know their rights are rarely held under the law, and it is generally invoked and useful against only the poor and those who do not know their rights.

The magistrates of the district courts do not apprise persons brought before them of their right to counsel, of their right to a jury trial, or of their right against self-incrimination, or in the case of district court complaints, in felony cases, of their right to a hearing.

Those who do not know their rights are thus deprived of them.

Bail is frequently set in labor cases higher than in ordinary criminal cases. Thus for example, twenty-five dollars is the usual bail fixed in misdemeanor cases. But in misdemeanor charges in labor cases, it is rarely set at less than fifty dollars to one hundred dollars.

Respectfully submitted,

HARRIET BOUSLOG

APPENDIX II

APPENDIX II.

MINORITY REPORT
ON
HOUSE BILL No. 442

RELATING TO RIOTS AND THE DISPERSION THEREOF, DEFINING OFFENSES AND PRESCRIBING PUNISHMENTS THEREFOR, AMENDING THREE SECTIONS OF CHAPTER 277 OF REVISED LAWS OF HAWAII 1945, AND REPEALING ALL OTHER SECTIONS OF SAID CHAPTER

This bill in purport puts back into the laws of the Territory similar chapters to those recently declared unconstitutional by the three-judge Federal Court last year. The only outstanding difference is the reduction of the sentence of imprisonment from twenty to two years. And under the provisions of Section 7 more than 100 men can be prosecuted under the law then in effect with its maximum of 20 years.

Further it is a directive to the Attorney General to ignore several of the first ten amendments to the Constitution of the United States.

The three-judge Federal Court that declared the similar law unconstitutional made a comparison of it to the riot act of England in the year 1715 when a felony was punishable by death and stated, in effect, that laws similar to HB 442 were more severe than the riot act of England. The old territorial statute stated that three men for any length of time, note—any length of time if engaged in rioting violated the law whereas the old English law specified twelve or more and that the law was only effective if they engaged in rioting for an hour or longer.

Under the terms of section 11571 of HB 442 which makes it a riot if six or more disturb the peace or threaten so to do, in the case of a football game where the goal posts are torn down or a group of six or more threaten to do so the participants would be guilty of rioting and not only would the actual six be subject to the law

but any persons present could be arrested or imprisoned. In effect, everyone in the stadium who did not leave immediately when told to do so by an officer could be subjected to arrest and conviction under the provisions of Section 11581.

We cannot in the same breath say as Legislators that Hawaii is ready for Statehood and at the same time pass such unconstitutional legislation as is contained in House bill 442.

If we want to promote peace and harmony we should not pass laws that create bitterness, hate and animosity.

If we, as legislators, want to make Democracy work then we urge that every legislator of this House uphold his oath of office and vote against passage of House bill 442.

Respectfully submitted by the Minority,

EARL E. NIELSEN (s)
STEERE G. NODA (s)

APPENDIX III

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Here is the setting in which the statute was passed as described by W. A. Kinney in a book entitled, "Hawaii's Capacity for Self-Government All But Destroyed." Mr. Kinney, for sixty years a resident of Hawaii and a member of one of the largest law firms, Kinney, Ballou and Prosser, published the book in 1927 in Salt Lake City. The book was so critical of the sugar planters that it was almost completely suppressed, the copies being bought up from all bookstores by the targets of its attacks.

For five or six years prior to 1850, when the law was adopted, there was an increasing agitation among the growing number of planters to import coolie labor, finding the Hawaiians unwilling to work for the wages the planters were willing to pay.

Succeeding finally in getting the land divided among the people, and finally in making it alienable, more and more land came into the hands of the planters. But the planters were not satisfied with the native as a laborer. Finally the missionary advisers of the King persuaded him to approve a contract labor law with penal provisions for enforcement. (See Appendix I.) Mr. Kinney's judgment is not kindly:

> Men with Bible in hand, and specific pledges to God of the most solemn and appealing kind, wound up by enslaving their own religious flocks, and getting their land away from them.

The unlawful assembly and riot statute was a necessary concomitant of the peonage law. Both were written by Chief Justice Lee, a eulogy of whom appears in the Record at page 1834.

Mr. Kinney thought somewhat less highly of Chief Justice Lee than appellants. Mr. Kinney could scarcely be described as pro-labor, for it was he who, when serving as special prosecutor for the H.S.P.A. during the 1909 Japanese strike, demanded of the Judge that the strikers not be permitted bail, arguing that it would be dangerous to allow them bail. (See Appendix I, p. 16.) He was also the special prosecutor in *Territory v. Soga.*

Of Chief Justice Lee, Mr. Kinney says at pages 91-92:

The address of Chief Justice Lee to the Hawaiian Agricultural Society, in 1850, on the occasion of being elected President of that Society, also illustrates the effrontery of the exploiting element. It should be borne in mind that when Chief Justice Lee, of the Hawaiian Judiciary, delivered this address, there were still in the Islands, according to a census just taken, 84,165 natives, against 1862 foreigners all told, and his exploiting audience was besprinkled with those who, at the time, were being aided in their support by church contributions from New England, as missionaries to the heathen. Judge Lee had the natives all but buried before he got through with his address, and had spade in hand to finish the job. Here it is, or a part of it:

"In a small island of the Pacific, which thirty years ago knew little culture, but that of the kalo patch, there has this day assembled the planter who counts his hundreds of acres of sugar cane and coffee trees, the farmer raising cargoes of vegetables for California, and the herdsman who gathers in his fold a thousand cattle. Indeed this is no every-day assemblage. I venture to predict that those who fill *our* places thirty years hence, will see *our* valleys blooming with coffee and fruit trees, *our* barren hillsides waving with luxuriant cane, and the grass huts now scattered over *our* lands, replaced by comfortable farm houses.

"There is one agent, however, that we require who holds the key of success — the great, brawny arm, hugefisted giant, called Labor. Now that the dark cloud is lifting from the natives (they were just emerging from an epidemic of measles and influenza) *there is hardly a nation left to save.* 'Alas, must this people perish—not by famine nor pestilence nor the sword, but by the *rust of Indolence, the canker of sloth.' Though but a lone remnant remain,* let us strive to gird it with strength to wrestle with its approaching destiny, to arm it with the healthy body, etc. Then if our last hope fails, etc., we can but commend it to Him in whose hands are the issues of life and death, etc."

At this time the Giant called "Labor" was being offered by the exploiters, and many of the native "Giants" were working for from 12½ to 25¢ per day, payable largely in goods on which Mr. Wyllie himself admitted a profit of one hundred per cent was not uncommon. These wages, Jarves the historian, computes was less than slave labor was costing the planters of the Southern States. That very year the peonage system had

been established in Hawaii; crops planted by the natives were being wasted by the cattle, and the lands of the King, chiefs and commoners were being swept away by foreigners in blocks, sometimes of thousands of acres. Under these conditions, the natives lived more upon their own holdings, or what was left of them, supplemented by much more lucrative employment, which, according to Jarves, they were very often able to obtain, and this they did in preference to accepting employment and small wages offered by aliens.